

No. 15736

United States
Court of Appeals
for the Ninth Circuit

HERRING MAGIC, a corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

DEC 11 1957

PAUL P. GIBBEN, CLERK

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer to Complaint.....	12
Appeal:	
Bond for Costs on.....	22
Certificate of Clerk to Transcript of Record on	23
Notice of	21
Statement of Points on (USCA).....	104
Stipulation That Exhibits May Be Considered in Original Form on.....	105
Bond for Costs on Appeal.....	22
Certificate of Clerk to Transcript of Record...	23
Complaint	3
Exhibit A—Claim for Refund.....	6
Findings of Fact and Conclusions of Law.....	16
Judgment	20
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	21

ii.

Opinion of the Court, Sept. 3, 1957.....	15
Statement of Facts.....	24
Opinion of the Court.....	101
Trial Stipulation	73
Witnesses for Plaintiff:	
Frear, Gordon S.	
—direct	62
—cross	64
Miller, Myron Charles	
—direct	26
—cross	51
—redirect	60
—rebuttal, direct	99
Witnesses for Defendant:	
Korff, Willis B.	
—direct	72, 76
—cross	86
—redirect	94
—recross	95
Miller, Myron Charles	
—direct	96
Statement of Points on Appeal (USCA).....	104
Stipulation That Exhibits May Be Considered in Original Form (USCA).....	105

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In the District Court of the United States Western
District of Washington, Northern Division

No. 4282

HERRING MAGIC, a Washington corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

For its cause of action plaintiff alleges:

I.

This is an action brought against the United States of America under the laws of the United States for the recovery of a manufacturers excise tax on sporting goods for the period of April 1, 1955, to December 31, 1955, erroneously assessed against and collected from plaintiff by William E. Frank, District Director of Internal Revenue for the District of Washington, at Seattle, hereafter called the District Director.

2.

Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

3.

Plaintiff manufactures and sells a device known by its trade name of "Herring Magic". This device

is used by fishermen to hold a minnow on the end of a fish line. Because of the shape of the device when pulled through the water the minnow moves and appears to swim, so that it is a more attractive bait for fish.

4.

The District Director of Internal Revenue at Seattle informed plaintiff that Herring Magic was subject to tax under the provisions of Section 4161 of the Internal Revenue Code of 1954. Upon the erroneous demand of the District Director at Seattle, Washington, under protest, plaintiff filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and under protest paid taxes erroneously claimed, in the total amount of \$2,323.35, as follows:

September 9, 1955.....	\$567.72
September 22, 1955.....	580.89
October 3, 1955.....	814.16
November 3, 1955.....	343.03
January 20, 1956	17.55

5.

On or about January 18, 1956, within the time and in the form and manner required by law, plaintiff duly filed with the District Director its claim for refund of these excise taxes paid as aforementioned in the sum of \$2,323.35. The claim set forth the grounds on which refund should be allowed. A true copy of this claim is attached hereto, marked Exhibit "A", and by this reference made a part hereof as if fully set forth.

6.

By letter, received by attorneys for plaintiff on November 8, 1956, numbered #33295 on form FL-214, and sent by registered mail, the District Director disallowed in full the claim of plaintiff and no part of plaintiff's claim for refund has been paid or refunded since that time.

7.

The aforementioned manufacturers excise tax was wrongfully and unlawfully assessed against and paid by plaintiff. The device, "Herring Magic", is not within the purview of any of the articles described in Section 4161 of the Internal Revenue Code of 1954.

8.

By reason of the foregoing, plaintiff has been erroneously assessed and has erroneously paid tax for the period of April 1, 1955, to December 31, 1955, in the amount of \$2,323.35. This sum should be refunded to it by defendant, The United States of America, together with interest at six percent per annum from the date of each payment of tax until plaintiff is repaid.

Wherefore, plaintiff, Herring Magic, Inc., prays for judgment in its favor against defendant, The United States of America, on its cause of action in the sum of \$2,323.35, together with interest at the rate of six percent per annum from the dates paid until repaid, for its costs and expenses herein in-

manufacturers' excise taxes assessed for the calendar quarters of April, May and June, and July, August and September of 1955. Taxpayer now claims a refund of these payments with interest from the dates of payment.

Taxpayer manufactures a product known as "Herring Magic". This product is patented under United States patent numbers 2461755 and D 155307. A sample of this product is enclosed. Herring Magic is manufactured in a series of sizes beginning with No. 1 and running through No. 4. The size used depends upon the size of the fish sought. The product consists of a piece of plastic shaped to actuate the bait or lure to be attached, an eye for attaching the fishing line, a clip to attach the bait or lure and two or three hooks attached by a strong line to a piece of plastic.

From examination of the sample, it is obvious that Herring Magic alone will not attract or lure any fish. The lure or bait which usually consists of a dead herring or minnow must be fastened to the plastic actuator by a safety pin attachment. When the bait or lure is so attached, the Herring Magic then is trailed through the water at the end of the fishing line. The plastic activator, because of its curvature, will move the trailing bait or lure through the water in a manner similar to a live but wounded herring or minnow.

The box in which Herring Magic is sold has on the top — "Herring Magic Trade Mark — Works Miracles with Minnows." On the sides and bottoms

the following information is given: "The Frantic Swimming Actionizer—Better Than Live Minnows at Their Best—True 'Crippled Minnow' Swimming Action—It's 'Red Hot' Wherever Big Fish Eat Little Ones—Herring Magic No. 1—\$1.75".

As is readily apparent, without attaching a bait or lure to Herring Magic, it would be impossible for Herring Magic to attract or catch any fish. So it would be useless as a fishing device. Herring Magic, as manufactured and sold by taxpayer without the attachment of bait or lure would be comparable to a hook without the worm—no lure, so no fish.

Section 4161 of Chapter 32—"Manufacturers' Excise Taxes" of the Internal Revenue Code of 1954 had its origin in Sec. 3406 of the old internal revenue code. This section, upon which taxpayer's taxes were assessed and on which taxpayer now claims a refund, states in part:

"Code Sec. 4161. Imposition of Tax.

"There is hereby imposed upon the sale by the manufacturer, producer or importer of the following articles (including in each case parts or accessories of such articles sold on or in connection therewith, or with the sale thereof) a tax equivalent to 10% of the price for which so sold: . . .

"Fishing rods, creels, reels and artificial lures, baits and flies . . ."

The only article enumerated in sec. 4161 which could include Herring Magic must result in a manufacturers' excise tax being assessed upon the manu-

facturer in the sale of Herring Magic is "artificial lures".

Webster's New International Dictionary Second Edition Unabridged of 1947 finds "artificial" as made or contrived by art; produced or modified by human skill and labor, often as an imitation of something found in nature;—opposed to natural; as artificial heat or light, gems, salts, minerals, fountains, flowers, breeding . . . feigned, fictitious; assumed, not genuine." It defines "lure" as "A contrivance somewhat resembling a bird, made of a bunch of feathers attached to a long cord and often baited with raw meat,—used by falconers in recalling hawks . . . That which invites by the prospect of advantage or pleasure; an allurement; enticement . . . A decoy or bait for fish or animals, specif., a tassellike structure on the head of pediculate fishes." The verb "lure" is defined as "to draw to the lure, hence to allure or invite by means of anything that promises pleasure or advantage; to entice."

It might be argued that Herring Magic is made or contrived by art. But certainly it is not an imitation of something found in nature; opposed to natural; or feigned, fictitious assumed or not genuine. If Herring Magic is considered artificial under this definition, then everything known to man would be artificial.

Even if Herring Magic might be considered artificial, it could not possibly be defined as a lure by any definition of this word. Herring Magic alone

would not invite, allure, entice, decoy or otherwise attract any fish. In fact, without the attached bait, it is the antithesis of the word "lure" and would in effect repel or scare away any fish that might see it passing through the water.

There appear to be no regulations, cases or authorities defining artificial lure. A letter mailed by the Treasury Department under date April 7, 1947, Ref. MT:ST:MMP, C 1 S-114856, addressed to Ernest Milholland and Kendon K. Smith, dba Evans Manufacturing Co., 76 University Street, Seattle 1, Washington, states in part:

"The term 'artificial lures' as set forth in section 3406 (a) (1) of the Code includes spoons, spinners and other bright metals used to attract fish to artificial bait as well as articles such as imitation mice, insects, minnows, etc., with or without hooks attached thereto, for use with or without bait.

"Trolling spoons, with or without hooks, are considered to be taxable artificial lures and the bureau is without authority to grant a refund of the tax on the manufacturer's sales of such trolling spoons on the grounds that the spoons are sold for use by commercial fishermen * * *"

In this letter it appears that the Treasury Department has followed Webster's definition of "artificial lure" and held taxable any lures that attract fish through artificial bait as well as articles such as imitation mice, insects and minnows.

Herring Magic does not attract fish and certainly

cannot be considered as an imitation mouse, insect, minnow or any other bait. Its only purpose is to hold a real herring. In itself it is not a lure and would attract nothing.

Thus it is respectfully submitted that Herring Magic is not an artificial lure within the intent and definition of this word as used in sec. 4161 of the Internal Revenue Code of 1954 and therefore is not taxable under the manufacturers' excise tax, and this claim for refund should be allowed.

[Endorsed]: Filed Dec. 6, 1956.

[Title of District Court and Cause.]

ANSWER

The defendant, United States of America, by its attorney, Charles P. Moriarty, United States Attorney for the Western District of Washington, in answer to plaintiff's complaint, admits, denies and alleges as follows:

1. Admits the allegations of paragraph 1 of the complaint, except it is denied that any taxes were erroneously assessed or collected from the plaintiff.

2. Admits the allegations of paragraph 2 of the complaint.

3. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint, except defendant admits that plaintiff

manufactures and sells a device known by its trade name of "Herring Magic."

4. Denies the allegations of paragraph 4 of the complaint, except it is admitted that plaintiff was informed that it was subject to tax under the provisions of Section 4161 of the Internal Revenue Code of 1954 and that plaintiff filed returns and paid the following amounts on the dates indicated:

September 12, 1955	\$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.85

5. Denies the allegations of paragraph 5 of the complaint, except it is admitted that Exhibit "A" attached to the complaint is a copy of a claim for refund filed by plaintiff on January 22, 1956, for the refund of \$2,323.35. Unless otherwise expressly admitted herein, each and every allegation contained in Exhibit "A" is denied.

6. Admits the allegations of paragraph 6 of the complaint.

7. Denies the allegations of paragraph 7 of the complaint.

8. Denies the allegations of paragraph 8 of the complaint.

Affirmative Defense

For its affirmative defense to plaintiff's complaint, defendant alleges:

I.

Upon information and belief, the plaintiff has not borne the economic burden of the tax of which it complains, but has included the tax in the sales price of the article sold.

II.

Upon information and belief, plaintiff has not repaid nor has it agreed to repay the tax to the ultimate purchaser of the article.

III.

Upon information and belief, plaintiff has not filed with the Secretary of the Treasury, or his delegate, the written consent of the ultimate purchasers of the article to the allowance of a refund to plaintiff.

IV.

Plaintiff has not complied with the requirements of Section 6416(a) of the Internal Revenue Code of 1954.

Wherefore, defendant prays for judgment in its favor, dismissal of plaintiff's complaint, for costs and such other relief as this Court deems proper.

/s/ CHARLES P. MORIARTY,
United States Attorney.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 4, 1957.

[Title of District Court and Cause.]

COURT'S ORAL OPINION

Tuesday, September 3, 1957.

Before Judge Bowen.

The Court: From a preponderance of the evidence the Court finds, concludes and decides as follows:

That the completed functioning lure in question here includes not only the device described in Plaintiff's Exhibit 1, but also the bait which it is hoped the lured fish will take. The completed functional thing, therefore, is that thing which, when cast into the water, serves to attract or allure the desired fish onto the hook. But the inanimate bait would not be activated so as to attract and allure the intended catch onto the hook in this instance without the work of plaintiff's actionizer. It is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of which thing the intended catch is lured onto that thing's hook. That device is the "artificial lure" taxed by the statute.

Therefore, it seems clear to the Court upon the evidence submitted during this trial the tax collector for the Government is correct in holding that this is an artificial lure subject to the tax, and that plaintiff is not entitled to recover in this action and that the plaintiff should take nothing by his complaint herein.

[Endorsed]: Filed Sept. 6, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court at Seattle, Washington, on September 3, 1957. Plaintiff appeared by Garvin, Ashley & Foster, and was represented in court by Thomas B. Foster and Daniel J. Riviera; and the defendant appeared by Charles P. Moriarty, United States Attorney for the Western District of Washington, and was represented in court by Allen A. Bowden, Attorney, Department of Justice, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service.

The Court, having considered the Trial Stipulation, the evidence and exhibits introduced by the parties, and the arguments and briefs of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, now finds the facts herein and states its conclusions of law as follows:

Findings of Fact

1. This is an action brought against the United States of America under the laws of the United States for the recovery of a manufacturers excise tax on sporting goods for the period of April 1, 1955, to December 31, 1955, assessed against and collected from plaintiff by William E. Frank, District Director of Internal Revenue for the District of Washington, at Seattle, hereafter called the District Director.

2. Myron C. Miller made application for a patent on the device hereinafter referred to on August 9, 1944. The patent based on the application was granted on February 15, 1949, as United States Patent No. 2461755. No application for or further patent has been granted to Myron C. Miller in connection with the device in question.

3. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the state of Washington. Plaintiff was incorporated on April 16, 1954. Myron C. Miller at all times mentioned herein has been and now is the majority stockholder of plaintiff.

4. Plaintiff commenced manufacturing a device known as Herring Magic on or about January 1, 1955, and commenced selling the device on or about March 7, 1955. This device is the subject of the patent mentioned above.

5. Various sizes of the device were sold by plaintiff to jobbers, wholesalers and retailers at prices ranging from \$0.7875 to \$0.99 commencing March 7, 1955. This price structure has remained unchanged to and including all times relative to this suit.

6. On or about May 1, 1955, Myron C. Miller, acting for plaintiff, made oral inquiry at the Seattle office of the District Director as to whether a manufacturers excise tax was applicable to the sale of the device here in question. As a result of this inquiry the District Director's office notified

the plaintiff on June 8, 1955, that the device was subject to the manufacturers excise tax imposed by Section 4161 of the Internal Revenue Code of 1954.

7. Thereafter, plaintiff filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and paid the following taxes on the dates and in the amounts as follows:

September 12, 1955	\$ 567.72
November 8, 1955	1,738.08
January 20, 1956	17.55

8. On or about January 18, 1956, within the time and in the form and manner required by law, plaintiff filed with the District Director its claim for refund of the excise taxes paid as aforementioned in the sum of \$2,323.35.

9. By registered letter, received by attorneys for plaintiff on November 8, 1956, the District Director disallowed in full the claim for refund. No part of plaintiff's claim for refund has been paid or refunded since that time.

10. The plaintiff has borne the economic burden of the taxes for which it seeks refund and has complied with the provisions of Section 6416(a) of the Internal Revenue Code of 1954.

11. The device herein referred to in paragraph 2, above, known by its trade name of "Herring Magic," is an "artificial lure," and the transcript and factual statements of this Court's Oral Opinion and Decision announced September 3, 1957 herein, and the whole thereof, are hereby incorporated here as a part of these findings.

Conclusions of Law

I.

The Court has jurisdiction of the parties and subject matter of this action.

II.

The plaintiff's device, patented and sold as set forth in the above findings, is an "artificial lure" within the purview of Section 4161 of the Internal Revenue Code of 1954.

III.

The manufacturers excise tax imposed by Section 4161 of the Internal Revenue Code of 1954 on the device, as so manufactured and sold, was legally imposed and collected from plaintiff, and judgment should be entered for the defendant and for costs to be fixed by the Clerk.

Done In Open Court this 6th day of September, 1957.

/s/ JOHN C. BOWEN,

United States District Judge.

Presented by:

/s/ ALLEN A. BOWDEN,

/s/ THOMAS R. WINTER,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 6, 1957.

In The United States District Court, Western
District of Washington, Northern Division

Civil Action No. 4282

HERRING MAGIC, a Washington Corporation,
Plaintiff,

vs.

THE UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This case came on for trial before the Court at Seattle, Washington, on September 3, 1957. Plaintiff appeared by Garvin, Ashley & Foster, and was represented in court by Thomas B. Foster and Daniel J. Riviera; and the defendant appeared by Charles P. Moriarty, United States Attorney for the Western District of Washington, and was represented in court by Allen A. Bowden, Attorney, Department of Justice, and Thomas R. Winter, Special Assistant to the Regional Counsel, Internal Revenue Service.

The Court, having considered the Trial Stipulation, the evidence and exhibits introduced by the parties, and the arguments and briefs of counsel, and being fully advised in the premises, and having heretofore rendered an oral opinion, and the Court having entered its Findings of Fact and Conclusions of Law herein, it is in conformity therewith

Ordered, Adjudged and Decreed that plaintiff

take nothing from this action, and its complaint be dismissed with prejudice, and that judgment be entered for the defendant herein and for its costs to be taxed by the Clerk.

Done In Open Court this 6th day of September, 1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented by:

/s/ ALLEN A. BOWDEN,
/s/ THOMAS R. WINTER,
Attorneys for Defendant.

[Endorsed]: Filed and Entered Sept. 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Herring Magic, Inc., the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on September 6, 1957.

GARVIN, ASHLEY & FOSTER,
Attorneys for Plaintiff.

[Endorsed]: Filed Sept 16, 1957.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

The undersigned plaintiff hereby deposits with the clerk of the above entitled court the sum of two hundred fifty dollars (\$250) in cash as its bond for costs on appeal and acknowledges that it and its successors in interest are bound to pay to the United States of America, defendant, the sum of Two hundred fifty dollars (\$250).

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed September 16, 1957, from the judgment of this court entered September 6, 1957, if the plaintiff shall pay all costs adjudged against it if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this cash bond shall be due forthwith.

HERRING MAGIC, INC., a

Washington corporation,

/s/ By DANIEL J. RIVIERA,

Of Garvin, Ashley & Foster,

Attorneys for Plaintiff-

Appellant.

Signed and acknowledged before me this 16th day of September, 1957.

[Seal] /s/ LOUIS H. PEPPER,

Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed Sept. 16, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit, and Rule 75(o) FRCP and designation of counsel, I am transmitting herewith the following original documents in the file dealing with the action, together with original exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit, at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed Dec. 6, 1956.
3. Answer of Defendant, filed Feb. 4, 1957.
6. Trial Stipulation, filed Sept. 3, 1957.
7. Court's Oral Opinion, filed Sept. 6, 1957, as transcribed by Court Reporter.
9. Findings of Fact and Conclusions of Law, filed Sept. 6, 1957.
10. Judgment, filed Sept. 6, 1957.
12. Notice of Appeal, filed Sept. 16, 1957.
13. Bond for Costs on Appeal, filed Sept. 16, 1957.
14. Designation of Contents of Record on Appeal, filed Sept. 16, 1957.
17. Order Transmitting original exhibits, filed 9/26/57.

15. Court Reporter's Statement of Facts (Record of Proceedings), filed 9/16/57.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to-wit: Filing Notice of Appeal, \$5.00; and that said amount has been paid to me by the attorneys for Appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 4th day of October, 1957.

[Seal] MILLARD P. THOMAS,
 Clerk,
 /s/ By TRUMAN EGGER,
 Chief Deputy.

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4282

HERRING MAGIC, a Washington corporation,
 Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

STATEMENT OF FACTS

Be It Remembered, that the above entitled and numbered cause was heard before the Honorable John C. Bowen, a Judge of the above entitled

Court, beginning Tuesday, September 3, 1957, at 10:00 o'clock a.m.

The plaintiff was represented by Mr. Daniel J. Riviera and Mr. Thomas B. Foster, of Messrs. Tanner, Garvin & Ashley, Attorneys at Law.

The defendant was represented by Mr. Allen A. Bowden, Attorney, Department of Justice, and Mr. Thomas R. Winter, Special Assistant to Regional Counsel, Treasury Department. [1]*

Whereupon, the following proceedings were had and done, to wit:

The Court: In the case on Trial, Herring Magic, a corporation, versus the United States, plaintiff's Counsel at this time may make an opening statement of what plaintiff thinks the proof will be in this case. Make it in a brief narrative form, please, Mr. Riviera.

Mr. Riviera: Yes, I will, your Honor.

(Thereupon, Mr. Riviera made an opening statement to the Court in behalf of plaintiff.)

The Court: The respondent may at this time or later if it chooses at a proper stage make the defendant's opening statement.

(Thereupon, Mr. Bowden made an opening statement to the Court in behalf of defendant.)

The Court: Call the plaintiff's first witness or let the plaintiff otherwise proceed with the plaintiff's case in chief.

Mr. Riviera: I should like to make one correc-

* Page numbers appearing at bottom of page of Reporter's Original Transcript of Record.

tion in Mr. Bowden's statement. He referred to the year 1949, I believe, as the time when an inquiry was made by the plaintiff. I believe the correct year is 1955. Is that correct, Mr. Bowden?

Mr. Bowden: Yes, your Honor, I'm sorry, I [2] misspoke myself.

The Court: For what year or years is this action contending as to the alleged tax?

Mr. Riviera: It covers the period from April, 1955, to December 31, 1955.

The Court: Repeat the years only. April what?

Mr. Riviera: April, 1955, through December of 1955.

The Court: You may proceed.

Mr. Riviera: The plaintiff calls as its first witness Mr. Myron Miller.

MYRON CHARLES MILLER

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riviera): Will you state your full name, sir? A. Myron Charles Miller.

Q. And where do you live at the present time?

A. At 4010 36th Avenue West, Seattle, Washington.

Q. What is your present occupation, Mr. Miller?

A. Manufacturing Herring Magics.

Q. How long have you been in the manufacturing business of the article which you have just described? [3] A. 1950.

(Testimony of Myron Charles Miller.)

Q. Before 1950 what was your occupation?

A. Advertising.

Q. And how long were you in that occupation?

A. 1941.

Q. Are you yourself a fisherman?

A. I consider myself so, yes, sir.

Q. How long have you been following that sport? A. Since about 1917.

Q. Have you done fresh water as well as blue water fishing? A. Yes, sir.

The Court: By "blue water" as being salt or fresh, what do you mean? What do you mean, blue? As distinguished from fresh, you spoke of fresh water, what do you mean by blue water?

A. That would be deep sea, out in the ocean.

The Court: Do you mean salt water, ocean water?

A. Yes, your Honor.

The Court: Proceed.

Mr. Riviera: May I have Plaintiff's Exhibit No. 1 marked for identification?

The Court: That opportunity will now be furnished to Counsel.

The Clerk: Plaintiff's Exhibit No. 1. [4]

(A Herring Magic was marked Plaintiff's Exhibit No. 1 for identification.)

The Court: Incidentally, have you a descriptive name for fresh water? You have spoken of salt water as blue water. Have you a descriptive word relating to color which you apply to fresh water?

(Testimony of Myron Charles Miller.)

A. No, sir, your Honor, except that it's referred to as fresh water.

The Court: You may proceed. I think you better place this in an envelope in view of the fish hook. It will do damage otherwise. Get some kind of an envelope, and be careful to avoid the fish hook.

(The clerk did as directed.)

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit 1 before you? A. Yes, sir.

Q. Will you please tell us what Plaintiff's Exhibit 1 is?

A. It's an actionizer for putting live swimming action back in a dead minnow of some kind, herring or otherwise, minnow.

Q. Will you take Plaintiff's Exhibit 1 into your hands and explain how the article is used?

A. The head of the bait minnow goes in here. This pin comes down through the head, locks in here, protects the head against the tearing force of the water as it's [5] drawn through, and this little body clamp retains the hooks at all times near the swimming minnow so that when a fish strikes they get the hooks as well as the minnow. This actionizer remains invisible when it is used in the water. The fish sees nothing but the minnow itself.

Q. Does the object which has been marked as Plaintiff's Exhibit 1, is that object patented?

A. Yes, sir.

Q. Do you know who invented the object?

A. Yes, sir. I invented it myself.

Q. When did you develop Plaintiff's Exhibit 1?

(Testimony of Myron Charles Miller.)

A. The first work on it, sir?

Q. Yes.

A. About 1940 I started experimenting on it.

Q. What were the first such devices made of?

A. I believe the first one was carved out of cedar.

Q. And how long did you work on the development of Plaintiff's Exhibit 1?

A. Well, up to date.

Q. Do you recall when you applied for a patent on Plaintiff's Exhibit No. 1?

A. Yes, sir, 1944.

Q. When was the patent issued to you?

A. In 1949. [6]

Mr. Riviera: If the Court please, may I have Plaintiff's Exhibit No. 2 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 2.

(A photograph was marked Plaintiff's Exhibit No. 2 for identification.)

The Court: When did you say you applied for the patent?

A. In 1944, sir, your Honor.

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 2 before you?

A. Yes, sir.

Q. It is a photograph, is it not?

A. That's right.

Q. Were you present when Plaintiff's Exhibit No. 2 was taken? A. Yes, sir.

Q. Do you know who took the picture?

(Testimony of Myron Charles Miller.)

A. Mr. Stevens, of Webster & Stevens, photographers.

Q. Would you describe Plaintiff's Exhibit No. 2?

A. This is a smelt. It should be a herring but I couldn't get a herring, so I used a smelt for this purpose, and this is inserted in the actionizer the same as——

The Court: The effect of the answer is to get into the record the contents of an exhibit. I [7] prefer you to identify it in the proper way. You may ask him what sort of information it contains or reflects, matters of that sort, without asking questions that will elicit a statement in the record of the contents of something that is not admitted in evidence.

Mr. Riviera: Very well, your Honor.

Q. (By Mr. Riviera): Mr. Miller, a few moments ago you described the use of Plaintiff's Exhibit No. 1. Does the Plaintiff's Exhibit No. 2 show in a pictorial fashion the use of Plaintiff's Exhibit No. 1? A. Yes, sir.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibits Nos. 1 and 2 into evidence.

The Court: Hearing no objection, each of them is admitted.

(Plaintiff's Exhibits Nos. 1 and 2 for identification were admitted in evidence.)

The Court: Now you can ask him to describe the information reflected by each of the two.

Mr. Riviera: Thank you, your Honor.

The Court: Will you for my convenience state

(Testimony of Myron Charles Miller.)

again, if you have not already, what kind of information is reflected by Plaintiff's Exhibit 2? What kind of information, what do you seek to show by [8] that exhibit, if you seek to show anything?

This is complete ready to——

The Court: What does it show?

A. It shows the Herring Magic actionizer attached to a minnow.

The Court: You may proceed.

Mr. Riviera: Very well, your Honor.

The Witness: In this manner we use it for luring salmon and various other fish.

Mr. Riviera: May I have Plaintiff's Exhibit No. 3 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 3.

(A patent was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 3 before you?

A. Yes, sir.

Q. Would you tell us what it is?

A. Exhibit No. 3 is a patent.

The Court: For what?

A. For this actionizer.

The Court: As shown in what exhibit?

A. It's Exhibit No. 3, your Honor.

The Court: No, no, actionizer shown in what [9] exhibit?

A. Shown in Exhibit No. 1.

The Court: You may proceed.

(Testimony of Myron Charles Miller.)

Mr. Riviera: Thank you, your Honor.

Q. (By Mr. Riviera): Mr. Miller, a few moments ago you referred to the date at which you applied for the United States patent which has been marked as Plaintiff's Exhibit No. 3. Now, at that time during the 1940's do you know of any other fishing device in general use that would produce the same effect in fishing as Plaintiff's Exhibit No. 1?

A. No, sir, I don't know of any other one.

Q. During the 1930's, if my question were framed as to the 1930's, would your answer be otherwise?

A. The answer would be the same, sir.

Q. Are you familiar with a company known as Herring Magic, Inc.?

A. Yes, sir.

Q. Do you know when that company was formed?

A. In 1954 I believe, sir.

Q. And are you an officer of that company?

A. Yes, sir.

Q. And you are the majority stockholder?

A. That's right, sir.

Q. Subsequent to the formation of Herring Magic, Inc. did [10] it commence the manufacture of objects similar to Plaintiff's Exhibit No. 1?

A. Yes. This——

Q. Have you—excuse me.

A. Pardon me.

Q. Have you assigned in any manner the patent which has been introduced as Plaintiff's Exhibit No. 3 to Herring Magic, Inc.?

A. Yes, sir.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibit No. 3 into evidence.

(Testimony of Myron Charles Miller.)

The Court: It is admitted.

(Plaintiff's Exhibit No. 3 for identification was admitted in evidence.)

Q. (By Mr. Riviera): Mr. Miller, when did the manufacture of Herring Magics, and by the term Herring Magics I believe Plaintiff's Exhibit No. 1, when did the manufacture of Herring Magics by Herring Magic, Inc. begin?

A. In late 1954, sir.

Q. At that time was there any advertising in existence describing the Herring Magic device?

A. Yes.

Mr. Riviera: If your Honor please, may I have Plaintiff's Exhibit No. 4 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 4.

(A printed folder was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 4 before you?

A. Yes, sir.

Q. Would you please tell us what it is?

A. Exhibit No. 4 is a printed folder that was used in the first Herring Magic boxes, along with the Herring Magic actionizer.

Q. Do you recall when the——

The Court: Pardon me just a minute. What is the nature of the information if any contained in that folder?

A. Your Honor, it briefly describes the Herring

(Testimony of Myron Charles Miller.)

Magic actionizer and contains suggested rules or instructions for its use.

The Court: Proceed.

Mr. Riviera: Thank you, your Honor.

Q. (By Mr. Riviera): Mr. Miller, do you recall when Plaintiff's Exhibit No. 4 was actually printed for you?

A. I'm sorry, I didn't get that question, please.

Q. Very well. Do you recall when Plaintiff's Exhibit No. 4 was printed up? [12]

A. Do I recall when it was printed?

Q. When it was first printed up, yes.

A. In 1954.

Q. Was Plaintiff's Exhibit No. 4 printed up before you went into production of Herring Magics or after? A. Before.

Q. Several months before? A. Yes, sir.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibit No. 4 into evidence.

Mr. Bowden: No objection.

The Court: It is admitted.

(Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Q. (By Mr. Riviera): Mr. Miller, will you look at Plaintiff's Exhibit No. 3, the patent. Who were your attorneys who prepared the application for Plaintiff's Exhibit No. 3?

A. Mr. Ford Smith of the firm of Smith & Tuck, patent attorneys.

Q. Mr. Miller, in preparing the application for

(Testimony of Myron Charles Miller.)

Plaintiff's Exhibit No. 3 was it your suggestion that the term "fish lure" be used? A. No, sir.

Q. Did the fact that the term "fish lure" was being used—— [13]

Mr. Bowden: Your Honor, I don't mind him leading a little, but I think he has gone too far.

The Court: Yes, the objection is sustained.

Mr. Riviera: Very well.

The Court: Of course, you know quite well the best way to do that is to ask if anyone made any such suggestion and, if so, who, and so on. Proceed.

Q. (By Mr. Riviera): Mr. Miller, did the term "fish lure" as used in Plaintiff's Exhibit No. 3 give you any concern when the application was made?

A. Yes, sir.

Q. In what manner? Why were you concerned?

A. Well, in my own thinking I could never accept it as a fish lure until something, some minnow or something is put in there to attract the fish.

Q. Did you object to the use of this term with your attorney?

A. I think I rather accepted my attorney's judgment on it at that time.

Q. In Plaintiff's Exhibit No. 4—would you please glance at Plaintiff's Exhibit No. 4—is the word "lure" used in Plaintiff's Exhibit No. 4?

A. Yes.

Q. At the time that Plaintiff's Exhibit No. 4 was printed was there any other term in general use describing the [14] Herring Magic device?

Mr. Bowden: Your Honor, I think that question

(Testimony of Myron Charles Miller.)

could be more appropriate, "Did you know of any other term," rather than "Was there".

The Court: Of course all these questions could be put in a form that could not be successfully attacked as leading by asking him, "State if you know," so and so, or in some other particular form I have found that the knowledge of the witness may be properly sought, and if he has the answer by some such question along the form that I suggested, the Court does not require that form.

Mr. Riviera: Very well, your Honor.

Q. (By Mr. Riviera): Mr. Miller, I will rephrase that question. At the time when Plaintiff's Exhibit No. 4 was printed up did you know of any other term that—— A. No, sir.

Q. Let me finish the question. Did you know of any other term in general use describing the use of Plaintiff's Exhibit No. 1? Is your answer the same?

A. Well, myself, I always——

The Court: Answer yes or no to that last question. If you do not understand the question, the Court will have it read for you.

The Witness: I would like the question again, [15] please.

The Court: It will be read.

(The reporter read back as follows: "Q. At the time when Plaintiff's Exhibit No. 4 was printed up did you know of any other term that—— "A. No, sir. "Q. Let me finish the question. Did you know of any other term in

(Testimony of Myron Charles Miller.)

general use describing the use of Plaintiff's Exhibit No. 1? Is your answer the same?")

The Court: Answer yes or no.

A. I will—I'll answer yes, sir.

Q. (By Mr. Riviera): What other term?

A. Actionizer.

Q. Do you know who suggested the term "actionizer"? A. Yes, sir.

Q. Who did? A. I did.

Q. Other than the term "actionizer" do you know of any other term? A. No, sir.

Mr. Riviera: If the Court please, may I have Plaintiff's Exhibit No. 5 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's Exhibit 5.

(A counter display card was marked Plaintiff's Exhibit No. 5 for identification.)

The Court: It did not occur to me that a tax case would involve a lot of exhibits. Now I ask Government Counsel to immediately get in touch with opposing Counsel in the two remaining cases and arrange a pretrial proceeding between Counsel as soon as possible and before the trials begin on all matters which may be the proper subject of pretrial proceedings.

Mr. Bowden: Thank you, your Honor.

The Court: You may proceed.

Q. (By Mr. Riviera): Mr. Miller, do you have Plaintiff's Exhibit No. 5 before you?

A. Yes, sir.

Q. Would you describe it?

(Testimony of Myron Charles Miller.)

A. Exhibit No. 5 is a counter display card.

Q. Do you know when Exhibit No. 5 was printed up?

A. It was in 1955, early in 1955.

Q. Was Plaintiff's Exhibit No. 5 printed up at your direction?

A. Yes, sir.

Q. And did you use Plaintiff's Exhibit No. 5?

A. Yes, sir. [17]

Q. In what year?

A. 1955.

Mr. Riviera: I offer Plaintiff's Exhibit No. 5, your Honor.

The Court: Did you say you offer it?

Mr. Riviera: Yes, I do, your Honor.

The Court: Any objection?

Mr. Bowden: No objection, your Honor.

The Court: It is admitted.

(Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

Mr. Riviera: May I have Plaintiff's Exhibit No. 6 marked for identification?

The Court: That will be done.

The Clerk: Plaintiff's 6.

(A jobber sheet was marked Plaintiff's Exhibit No. 6 for identification.)

The Court: State if you know what kind of information Plaintiff's Exhibit 6 reflects.

A. Exhibit 6 is used as a jobber sheet.

The Court: Jobber—

A. Jobber sheet.

The Court: Sheet. Do you spell it j-o-b—

A. J-o-b-b-e-r.

The Court: You may proceed. [18]

(Testimony of Myron Charles Miller.)

The Witness: It's used in the jobber catalogue.

The Court: That is sufficient.

Q. (By Mr. Riviera): Mr. Miller, do you know when Plaintiff's Exhibit No. 6 was printed up?

A. Yes, sir. At the same time as the counter card, in 1955.

Q. Do you know if Plaintiff's Exhibit No. 6 was ever used? A. Yes, sir.

Q. Who used it? A. Seattle jobbers.

Mr. Riviera: If your Honor please, I offer Plaintiff's Exhibit No. 6 into evidence.

The Court: Any objection?

Mr. Bowden: No objection, your Honor.

The Court: It is admitted.

(Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

Mr. Riviera: May I have Plaintiff's Exhibit No. 7 marked for identification?

The Court: I wonder if you could not just have all of these exhibits now marked, just mark them all.

Mr. Riviera: Very well, your Honor.

The Clerk: Plaintiff's Exhibit 7. [19]

(Advertisement of Herring Magic was marked Plaintiff's Exhibit No. 7 for identification.)

The Court: You ought to have an envelope for exhibits that are not easily handled.

Mr. Riviera: I will provide an envelope this afternoon.

The Court: If the clerk does not have any en-

(Testimony of Myron Charles Miller.)

velopes I ask him to send the bailiff now to get some. How many exhibits have you that will involve fishhooks?

Mr. Riviera: There is an additional exhibit which will involve fishhooks, your Honor, but it is quite large and we will have a container for it.

The Court: Very well. Proceed.

The Clerk: Plaintiff's 8 and 9.

(Example of a Herring Magic device with red dot was marked Plaintiff's Exhibit No. 8 for identification.)

(Letter dated June 8, 1955, from District Director, Internal Revenue Service, to Myron Miller, was marked Plaintiff's Exhibit No. 9 for identification.)

The Clerk: Plaintiff's 10.

(Copy of Claim for Refund was marked Plaintiff's Exhibit No. 10 for identification.)

The Clerk: Plaintiff's 11. [20]

(Letter from District Director, Internal Revenue Service, to Herring Magic Inc., was marked Plaintiff's Exhibit No. 11 for identification.)

The Court: Is that all of them, Mr. Bruff?

The Clerk: Yes, your Honor.

The Court: Are both Counsel, Counsel on both sides, acquainted with these Exhibits 7 to 11, inclusive, so far as their nature is concerned?

Mr. Riviera: It's my understanding that we are, your Honor.

(Testimony of Myron Charles Miller.)

Mr. Bowden: Yes, your Honor, we've gone over them.

The Court: Mr. Riviera, if you think you can agreeably to opposing Counsel do so, state what information each one possesses, give it a character name.

Mr. Riviera: Very well, your Honor.

The Court: A one word name, if possible, that reasonably reflects the nature of the information.

Mr. Riviera: I will try, your Honor.

The Court: No. 7 first. And if opposing Counsel has any objection to this he will please say so.

Mr. Riviera: If your Honor please, I'm holding Plaintiff's Exhibit No. 7, which is an example of a type of advertising used by Herring Magic, Inc.

Mr. Bowden: Your Honor, I would have to [21] object to that. I'd like to be a little more precise and have the title to it read, perhaps. We have a number of different types of advertising samples in evidence already.

The Court: Which particular type of advertising is this, if it has a particular type?

Mr. Riviera: Yes, your Honor, this is a type of advertising used by Herring Magic, Inc., for distribution to wholesalers for their use in advertising Herring Magic, Inc. It has——

The Court: Was there any other type of advertising furnished by plaintiff which was for the wholesale use?

Mr. Riviera: No, your Honor.

The Court: All right.

(Testimony of Myron Charles Miller.)

Mr. Riviera: This advertising is different from the other in that a space is provided for the wholesaler or dealer's own name.

The Court: All right. Wholesaler's type of advertising, is that it?

Mr. Riviera: Yes, your Honor.

The Court: The next one.

Mr. Riviera: I'm holding in my hand Plaintiff's Exhibit No. 8, which is an example of a Herring Magic device, and differs from Plaintiff's Exhibit No. 1 [22] in that a red colored dot is suspended in the plastic.

The Court: Actionizer with a red dot, is that right?

Mr. Riviera: Yes, your Honor.

The Court: Next, No. 9.

Mr. Riviera: I'm holding in my hand Plaintiff's Exhibit No. 9, which is the original letter dated June 8, 1955 from the office of the District Director of Internal Revenue to Mr. Myron Miller expressing the office's opinion as to the applicability of the tax to the Herring Magic device.

The Court: You ought to have a shorter name than that describing it.

Mr. Riviera: Well, it's a letter from the District Director's office dated June 8, 1955.

The Court: Can you give a better name than that? Somebody ought to.

Mr. Bowden: Just District Director's letter would be sufficient for my purposes, your Honor, together with Commissioner's ruling.

(Testimony of Myron Charles Miller.)

Mr. Riviera: Yes.

The Court: Was the ruling favorable or unfavorable from the taxpayer's standpoint?

Mr. Riviera: From the taxpayer's standpoint it was unfavorable. The ruling was not attached to the [23] original letter, but Counsel and I have agreed that a copy of it should be attached at this time.

The Court: Unfavorable to the taxpayer but favorable to the Internal Revenue?

Mr. Riviera: Yes, your Honor.

The Court: Next one.

Mr. Riviera: Plaintiff's Exhibit No. 10 is a copy of plaintiff's claim for refund.

The Court: Refund claim. The next one?

Mr. Riviera: Plaintiff's Exhibit No. 11 is the District Director's letter disallowing the claim, a letter of disallowance.

The Court: Refund disallowance, is that right?

Mr. Riviera: Yes, your Honor.

The Court: Do you offer each one of these?

Mr. Riviera: Yes, I do, your Honor.

The Court: Any objection?

Mr. Bowden: No objection, your Honor.

The Court: Plaintiff's Exhibits 7 through 11 are admitted, each and all of them.

(Plaintiff's Exhibits Nos. 7, 8, 9, 10 and 11 for identification were admitted in evidence.)

The Court: Now proceed with something else [24] other than exhibits.

Mr. Riviera: Very well, your Honor.

Q. (By Mr. Riviera): Mr. Miller, will you pick

(Testimony of Myron Charles Miller.)

up Plaintiff's Exhibit No. 9. Do you know who made inquiry of the District Director's office that elicited Plaintiff's Exhibit No. 9?

A. Yes, sir. I did.

Q. Do you recall when you made the inquiry?

A. No, I do not.

Q. From the date of Plaintiff's Exhibit No. 9 can you fix an approximate date when you made inquiry?

A. I would say about April, possibly, of 1955.

Q. Was the inquiry made oral or written?

A. Oral.

Q. When you made this inquiry was anyone else present with you? A. No, sir.

Q. To whom did you speak at the office of the District Director?

A. I believe it was Mr. Graham.

Q. At the time you made the inquiry did you have any examples of the Herring Magic device with you? A. Yes, sir.

Q. Among the exhibits before you is there any example?

A. It isn't here now. I believe it's Exhibit No. 8. [25]

The Clerk (Handing exhibit to witness): Is that it? A. That's right, Exhibit No. 8.

Q. (By Mr. Riviera): At the present time, Mr. Miller, are Herring Magics manufactured with the red dot? A. No, sir.

Q. When were Herring Magics manufactured with the red dot? A. In 1954.

(Testimony of Myron Charles Miller.)

Q. Were samples, or were Herring Magics similar to Plaintiff's Exhibit No. 8 sold to the public generally?

A. A very few were sold in early 1955, possibly January.

Q. Do you know whose suggestion it was to place the red dot in the Herring Magic device?

A. It was the suggestion of one of our dealers.

Q. And how long was the red dot used in a Herring Magic device?

A. Possibly two months.

Q. At the time you made inquiry of the District Director's office do you know if Herring Magic devices were then manufactured with the red dot?

A. No, sir, they were not.

Q. Did you inform the gentleman to whom you made inquiry at the District Director's office of that fact? A. I'm sure I did.

Mr. Riviera: If your Honor please, we have [26] one or two other exhibits of a different nature which I should like to introduce at this time.

The Court: You may bring them forward. Proceed in the same manner you did with the last three or four.

I would like to say that the Court does not feel that the Court will be greatly benefited by any works of art or by any balloonizing of photographs or any artly studies of pictures. The things themselves as they were, as I understand it, facsimiles of the things, have been received in evidence. Have that in mind, will you?

(Testimony of Myron Charles Miller.)

Mr. Riviera: Yes, your Honor.

The Court: Proceed.

The Clerk: Plaintiff's Exhibit No. 12.

(A board containing a display of lures was marked Plaintiff's Exhibit No. 12 for identification.)

The Clerk: Plaintiff's Exhibit No. 13.

(A jar of water containing a Herring Magic device was marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Riviera: If your Honor please, Plaintiff's—

The Court: This exhibit for identification 13 [27] is a good illustration of what should not ever be done. You have apparently a clear glass jar containing a clear liquid as if it were water, and anybody knows that glass will break on the slightest provocation, and almost anyone who has had any experience from their infancy with handling other people's gadgets usually know that the first stranger to the exhibit who starts to pick it up and handle it will drop it and the glass will break and the water will run all over everything around it. Now what is there about this exhibit that is needful in this litigation?

Mr. Riviera: If your Honor please, Plaintiff's Exhibit No. 13 has this point: We sought to have an example for the Court's own inspection of the effect, the visual effect of the Herring Magic device in water. In this particular case Plaintiff's Exhibit No. 13 is filled with clear tap water.

(Testimony of Myron Charles Miller.)

The Court: Also most people would know that water and the objects in the water or submerged in the water, all of which water and submerged objects contained within the glass wall, have a different than a natural view to the ordinary human eye, and the chances are that some sort of either the diminution of size or enlargement of size of the objects will be effected by the glass wall and water surrounding the objects and [28] will make of it an unnatural thing or exhibit. You may proceed.

Mr. Riviera: If your Honor please, I have described Plaintiff's Exhibit No. 13. I have not described Plaintiff's Exhibit No. 12.

The Court: You may proceed.

Mr. Riviera: Plaintiff's Exhibit No. 12 is a display of articles commonly called lures by the general public, and it is a display of common ones being used at the present time. I offer Plaintiff's Exhibit Nos. 12 and 13 into evidence, your Honor.

Mr. Bowden: Your Honor, I take it that Exhibit 13 is a duplication of Exhibit 1. Am I correct or am I inaccurate? If it is, why I feel——

The Court: Let Counsel see it. Exhibit No. 12 is a board. Exhibit No. 12 is a board, an array of things on it, is it not?

Mr. Bowden: Yes, your Honor, it is. I was just inquiring about Exhibit No. 13, which is the item that is immersed in water.

(Plaintiff's Exhibit No. 13 for identification was handed to Mr. Bowden.)

(Testimony of Myron Charles Miller.)

Mr. Bowden: I'm not a technician, but I would like to ask of Counsel, is that a duplicate of Exhibit No. 1? [29]

Mr. Riviera: It is a duplicate in the sense that it is the same device. It is a different size. Other than that it is the same.

I believe we stipulated that such a device, such an exhibit could be introduced subject only to the objections covered in the stipulation.

Mr. Bowden: To relevancy, your Honor, and I'm just trying to find out whether that is truly relevant to this controversy since we do have one in. If, however, it is to show that it is invisible, why I of course can see that it is visible in the jar.

The Court: Could you see it anywhere else? Is there any dispute on that, that it is invisible in water?

Mr. Bowden: Our witnesses will testify that it is not invisible in water, your Honor.

The Court: Proceed. This exhibit is meant to bear upon that question, indicative according to plaintiff's contention that this exhibit indicates it is invisible, is that right?

Mr. Riviera: In the general matter, yes, your Honor, that's right.

The Court: That question is in dispute, is it?

Mr. Riviera: Apparently it is, your Honor. [30]

The Court: Do you offer Exhibit 13?

Mr. Riviera: 12 and 13, your Honor, yes.

The Court: Each of them is now admitted.

(Testimony of Myron Charles Miller.)

(Plaintiff's Exhibits Nos. 12 and 13 for identification were admitted in evidence.)

Q. (By Mr. Riviera): Mr. Miller, would you examine Plaintiff's Exhibit No. 12. Are you familiar, Mr. Miller, with the devices shown on Plaintiff's Exhibit No. 12? A. Yes, sir.

Q. Would you describe how you would use any one of them? Pick any one out.

A. Well, this spoon on the top is complete and capable of luring a salmon by drawing it through the water. You don't need anything else with it, such as a minnow or anything like that. Each of these are capable of attracting and luring a fish by themselves.

Q. Mr. Miller, each of the devices shown on Plaintiff's Exhibit No. 12, do you use each of those devices with or without some other form of bait such as worms or minnows?

A. Most of these are complete in themselves. I personally wouldn't put anything with them, such as a worm or the tail of a herring or anything like that. They're complete by themselves.

Q. Mr. Miller, referring again to Plaintiff's Exhibit No. [31] 12, do any of the devices—do you know if any of the devices on Plaintiff's Exhibit No. 12 produce any action simulating live bait when used in the water?

A. Yes. This one marked "B" has a revolving action in the water. It has a—similar to a crippled herring. However, it does not produce a swimming action, it only revolves.

(Testimony of Myron Charles Miller.)

Q. Is there any device upon Plaintiff's Exhibit No. 12 that will produce a swimming action?

A. Yes. Now, this plug marked "M" will have a swimming action, but it is not the true swimming action of a minnow.

Q. Mr. Miller, have you ever observed the use of the Herring Magic device in the water when a minnow is placed in the device? A. Yes, sir.

Q. Would you describe the action of the device with the minnow in the water when used?

A. The herring when inserted in the Herring Magic actionizer becomes alive and swims precisely the way it would if it were alive and being pursued by a feeding fish.

Q. When you say "alive," do you mean that the body of the fish simulates life?

A. That's right, sir.

Q. What causes this movement of the minnow?

A. The actionizer as it is drawn through the water becomes a mechanical device by means of the pressure on the water—the water pressure, rather, excuse me, and that conveys the action right back into the dead fish and makes it come to life.

Q. Does any portion of the dead fish to which you have just made reference move?

A. Yes, sir.

Q. What portion?

A. Every part of the body of the dead minnow moves.

The Court: At this point we will take about a ten minute recess.

(Testimony of Myron Charles Miller.)

(Short recess.)

The Court: All are present. You may proceed.

Mr. Riviera: Thank you, your Honor.

Q. (By Mr. Riviera): Mr. Miller, is the Herring Magic device, an example of which has been introduced as Plaintiff's Exhibit 1, is the Herring Magic device designed to be used alone?

A. No, sir.

Q. Have you ever used it alone without a minnow? A. Yes, sir.

Q. Would you describe what occurs or what did occur when you so used it?

A. There isn't any balance if it doesn't have a minnow [33] in it.

Q. What action occurs with the Herring Magic device in the water? That is to say, what does the device itself do in the water when used alone?

A. It just tumbles around in the water. It usually twists up in the water, twists the leader up.

Mr. Riviera: That concludes my direct examination at this time, your Honor.

The Court: You may inquire.

Cross Examination

Q. (By Mr. Bowden): With respect to Plaintiff's Exhibit 3, a copy of the patent, you stated that you signed the application which ultimately obtained this patent, is that correct?

A. Yes, sir.

Q. And contained in this patent, is it true that it is headed Fish Lure and states that it is a fish

(Testimony of Myron Charles Miller.)

lure throughout the entire patent? A. Yes, sir.

Q. Now, in respect to Plaintiff's Exhibit 4, which has been referred to as old advertising, does that state the Herring Magic being quote a hot lure unquote? A. Yes, sir.

Q. In respect to Plaintiff's Exhibit No. 5, which has been [34] referred to as a counter placard, does that also state that the Herring Magic is a lure, or is the word "lure" used on that particular piece of advertising? A. Yes, sir.

Q. With respect to Plaintiff's Exhibit 6, which has been referred to as a jobber sheet,—

A. Yes, sir.

Q. Do you have that before you, Mr. Miller? Yes. Does that also have the word "lure" on it?

A. Yes, sir.

Q. In respect to Plaintiff's Exhibit 7, which is a wholesaler's type of advertising, does that also have the word "lure" on it?

A. I don't see it, sir.

Q. Would you look at it very carefully? "Lure" or "lures", pardon me. A. Yes, sir.

Q. It does? A. Yes, sir.

Q. Mr. Miller, what in your opinion would you say constituted a lure? How would you define a lure, in other words?

A. Well, I would define a lure as a device capable of attracting and hooking a fish, a game fish.

Q. Now, what would that necessarily have to consist of?

A. Various spoons, plugs, various minnows. [35]

(Testimony of Myron Charles Miller.)

Q. Well, and how are fish lured? In other words, what attracts a fish?

A. Oh, I would imagine that any device that closely simulates the natural food they eat would attract them.

Q. Well, more precisely, Mr. Miller, what does your particular device do which is intended to attract fish?

The Court: If it is so intended.

A. The Herring action—Herring Magic actionizer is nothing until a minnow is put in it. There isn't any action, there isn't anything there except the hooks as far as visibility is concerned. It was never intended to be used without a minnow.

Q. Well, we——

The Court: Is it claimed by you in the patent or is it in fact claimed by you that it does have some feature that a minnow does not have in and of itself alone in attracting a fish to the hook or to the bait?

A. Your Honor, I've never—no, sir, I've never thought of it that way at all.

The Court: You have not? A. No.

The Court: In other words, just any old actionizer, no matter what kind, would be expected to produce as good results to a sport fisherman as yours, is that right? [36]

A. No, Your Honor. The action——

The Court: What is there about yours that is particularly efficient in bringing about the object

(Testimony of Myron Charles Miller.)

of a sport fisherman, namely catching a fish on the hook that is on the end of the leader?

A. Your Honor, the action imparted to a herring by the Herring Magic actionizer gives it a very realistic live swimming action.

The Court: For what purpose do you want that?

A. It's the only way I know of to get a fish to hit.

The Court: You want to catch a fish, is that right? A. That's right, sir.

The Court: And you use that actionizer to help attract that fish onto your hook, is that right?

A. Yes, Your Honor. When you bait it with a minnow, then you have a complete unit capable of attracting and catching a fish.

The Court: Would a minnow baited hook catch as many fish without your actionizer as it would with it according to your idea of its function?

A. No, sir.

Mr. Bowden: I'm sorry, I didn't get the answer to that question, Mr. Miller. [37]

A. Oh, I'm sorry.

Mr. Bowden: Would you read His Honor's question?

The Court: Read the question.

(The reporter read the last question by the Court as follows: "Would a minnow baited hook catch as many fish without your actionizer as it would with it according to your idea of its function?") A. No, sir.

The Court: You may inquire.

(Testimony of Myron Charles Miller.)

Q. (By Mr. Bowden): In your opinion, Mr. Miller, would a hook baited with a dead minnow constitute a lure?

Mr. Riviera: If Your Honor please, I object to this question. I would be glad to ask similar questions myself, but I believe that is the function of the law, to determine what—these opinions I believe hinge on the legal definition of the very term in issue.

The Court: The objection is overruled.

The Witness: May I have that question again, please?

The Court: It will be read, Mr. Reporter.

(The reporter read the last question.)

A. Yes, sir. [38]

Q. (By Mr. Bowden): It would constitute a lure? A. Yes, sir.

Q. Well, going back one moment to how you define a lure and what a lure is intended to do, would you still say that a hook baited with a dead minnow would constitute a lure? A. Yes, sir.

Q. Now, your device improves upon that device, is that your—would you say that, Mr. Miller?

A. Pardon me, sir?

Q. Your particular device, the Herring Magic, does that improve upon the hook with the dead herring on it? In other words, what does it do in addition to what would be done already?

A. It very definitely gives it a superior action to the action you'd get by just the herring itself.

(Testimony of Myron Charles Miller.)

Q. Well, then it is the action that attracts the fish, is that your testimony, Mr. Miller?

A. It is the action of the herring that attracts the fish.

Q. Yes, but you don't have that action unless you've got your device attached to it, is that correct?

A. There are many means of obtaining action. I'm sorry——

Q. Mr. Miller, just one question. Is it your device that causes the fish—causes the attraction in the dead fish? [39]

A. Yes, sir.

Q. In other words, the fish in and of itself is dead, it's immobile; it will not move, will it?

A. That's right, sir.

Q. Now, when you hook your device to it, why then motion is commenced when it's pulled through the water, is that correct?

A. That's correct, sir.

Q. Now, it is this motion that attracts the fish, is that correct?

A. That is right.

Q. And it's your actionizer that causes the motion, is that correct?

A. No, sir.

Q. Well, then, what does cause this motion?

A. The herring must be in there to get the action. The herring must be connected to the actionizer to get the action.

Q. Well, now, you previously said that the thing wouldn't work or isn't intended to work in and of itself, isn't that correct?

A. That's right, sir.

(Testimony of Myron Charles Miller.)

Q. And you also said it requires some balancing or some weighting, is that correct?

A. That's right. [40]

Q. Now, you say it won't work unless it's got the herring in there. Now, does it necessarily have to have a herring in there? Couldn't it have some other type of weighting or balancing?

A. I've never tried it with anything else, sir.

Q. Well, you've said you've fished rather extensively, haven't you, Mr. Miller?

A. Yes, sir.

Q. But you haven't had occasion to use this particular device other than with a minnow or herring in it, is that correct?

A. That's correct, sir.

Q. But you don't know whether it would work with some other weighting? In other words, a strip of herring or a weight or something like that, you're not prepared to say whether it would attract fish or would attract fish in that particular posture?

A. Yes, sir, I would say that if a strip of herring is put in similar to a whole herring, that would accomplish the object of making that strip swim, if it is the proper size and put in there properly.

Q. But it is your device that makes it appear—gives it that swimming appearance?

A. Yes, sir, that's right.

Q. Now, what is it in your device that actually attracts [41] the fish then, if I may go back to that, is it the motion, is it the color, is it the smell, just exactly what does attract the fish?

A. It is the struggling swimming action pro-

(Testimony of Myron Charles Miller.)

duced by the herring or the minnow or the cut bait, and also the taste of the cut minnow or the herring in the water.

Q. What is your understanding of bait, Mr. Miller? A. Minnows?

Q. No, no, just bait in general.

A. Well, I would—I still would have to stay with the minnows.

Q. Well, in other words I'm not much of a fisherman, Mr. Miller, so you'll have to go slow with me on this, but as I recall we've used such things as worms on hooks, small mackerel, we've used any number of different types of things which are intended to catch fish.

Now, fish are attracted to that, what, because of the smell, is that what attracts them, and we're using that as bait, aren't we?

In other words, its sole purpose is it looks like something good to eat, so the fish grabs it. Now, how do you define bait?

A. I don't know how I would describe anything else except a minnow in this because it's precisely intended for a minnow. [42]

Q. Well, now, are you saying that the minnow is put in here as bait? A. That's right, sir.

Q. Oh, I see. Well, now, I didn't understand it. I understood that that was part of the lure. Now, you're actionizing bait, is that what your device is intended to do, Mr. Miller?

A. That's right, sir.

Q. Now, we were speaking some time ago, or

(Testimony of Myron Charles Miller.)

you were speaking some time ago, Mr. Miller, of the fact that this device was not complete in and of itself, it required an additional something. Was your testimony along those lines, Mr. Miller?

A. Yes, sir.

Q. Now, let me establish this: You examined Plaintiff's Exhibit 12 which was a display of lures, I believe, and you indicated that substantially all of those were complete in and of themselves. Now, are there other lures, other devices known as lures which are sold and which are known in the industry as lures which require the addition of some other thing?

A. There are actionizers or harnesses, some people call them harnesses, that are used to receive a bait.

Q. Well, now, you say they are actionizers or they are used to receive bait. Are they known in fishing circles as [43] lures or are they known as actionizers? In other words,—well, answer that question if you don't mind, Mr. Miller.

A. Pardon me? Yes. I don't believe they are called lures unless they are complete.

Q. In other words, they require nothing in addition to the object or the device which is shown there on Plaintiff's Exhibit 12, is that correct?

A. I would like to have that again, please. I'm sorry.

Q. I'd like to rephrase that question for your assistance, Mr. Miller. Is it your testimony that

(Testimony of Myron Charles Miller.)

lures are generally understood in fishing circles as being complete in and of themselves?

A. Yes, sir.

Q. And furthermore that to be a lure, a lure does not require the addition of another object, whether it be bait, whether it be a weight or whether it be a sinker or something like that, it's complete in and of itself? A. That's right, sir.

Q. That's your understanding?

A. Yes, sir.

Mr. Bowden: I have no further questions, your Honor. [44]

Redirect Examination

Q. (By Mr. Riviera): Mr. Miller, your last answer was directed—was in answer to a question somewhat to the effect that the device is complete in and of itself, and Mr. Bowden used the words “sinkers” or “leads” or something like that. Now, Mr. Miller, other devices that Mr. Bowden referred to that attract in and of themselves, do they require any minnows, worms or cut fish?

A. Some of them do.

Q. Do you ever use sinkers on your pole or lines when you are using the Herring Magic?

A. Yes, sir.

Q. Do you know if that is the general practice?

A. Yes, sir.

Mr. Riviera: No more questions.

Mr. Bowden: No more questions, your Honor.

The Court: Suppose you took a piece of wood painted like a herring and put it inside of a clock-

(Testimony of Myron Charles Miller.)

work or some other kind of a machine that would activate it; what interpretation would you put on the result? A lure or a device?

A. Your Honor, I would call that a device.

The Court: You would?

A. Yes, sir. [45]

The Court: In other words, the sum total is not a lure, it is still a device that causes the actionizer producing the object of the lure, or the device is itself something that was introduced into what appears to be the luring thing, is that your reason for your conclusion?

A. I don't quite understand, your Honor. I'm sorry.

The Court: Your actionizer is on the outside of what you call the lure, is it not, the fish?

A. Yes, that's right, your Honor.

The Court: The fish, the bait, the dead herring in your instance you claim is the lure, do you not?

A. Yes, sir.

The Court: And your actionizer you claim is a device?

A. Yes, sir.

The Court: Suppose your actionizer was inside the dead herring and made it appear to have life and therefore more attractive and more alluring to the fish to be caught; would that make any difference on your concept of whether the finished product was a lure or a device?

A. No, sir. [46]

The Court: It would not, it would still be a

(Testimony of Myron Charles Miller.)

device. Your apparatus if put inside the fish as a clockworks or a motor or some kind of an electric propelled action would still be a device if put inside the dead herring, is that right?

A. Yes, sir.

The Court: You may proceed.

Mr. Riviera: The plaintiff calls Mr. Gordon Frear.

(Witness excused.)

GORDON S. FREAR

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Riviera): Would you please state your name? A. Gordon S. Frear.

Q. And where do you live?

A. 11213 First Northwest, Seattle.

Q. And what is your present occupation?

A. I'm in the advertising business and the publishing business in the outdoor field.

Q. What publications do you publish, if any?

A. Pacific Northwest Fishing and Hunting Guide, we're in our [47] twentieth year; Fishing and Hunting News in Oregon, and Outdoor Empire News in the State of Washington. They are weekly newspapers.

Q. Have you yourself engaged in the sport of fishing? A. Yes, sir.

Q. For how long?

(Testimony of Gordon S. Frear.)

A. As long as I can remember.

Q. Do you give talks in this field?

A. Yes, I lecture in the field at sports clubs, show movies, take pictures which I attempt to sell. I have given demonstrations.

Q. Do you manufacture any fishing gear?

A. I tie my own flies for my own personal use.

Q. But nothing commercially?

A. No, that's right.

Q. And are you familiar with the various outlets in the City of Seattle for fishing gear?

A. Yes. I sell to and do business with a good many manufacturers of fishing equipment and also the jobber outlets and also the dealer outlets in the Northwest.

Q. When you say "the Northwest," what states do you refer to?

A. Well, Washington and Oregon mainly.

Q. Have you ever used the device known as Herring Magic? A. Yes, I have. I have, yes.

Q. Have you ever had occasion to use the Herring Magic device without a dead fish attached to it?

A. Well, the thought has never occurred to me until this case came up.

Q. Mr. Frear, would you examine Plaintiff's Exhibit No. 12. Are you familiar with the objects shown on Plaintiff's Exhibit No. 12?

A. Most of them I'm familiar with, yes.

Q. Have you used any of them yourself?

(Testimony of Gordon S. Frear.)

A. Well, if not these exact ones, ones very similar to them, yes.

Q. In the use of the objects shown on Plaintiff's Exhibit No. 12 do you use any bait, for example worms, fish or cut fish, in addition to the object itself?

A. Well, these spoons, plugs or lures are all intact in themselves and perform a complete catching action as they are.

Q. In your opinion is the Herring Magic device, an example of which has been introduced as Plaintiff's Exhibit 1, is the Herring Magic device capable of attracting fish by itself?

A. Well, I know of—I wouldn't say—I wouldn't say that it's impossible, but I wouldn't think that anybody that's out for fishing for fun would waste their time with a device like the Herring Magic in the water without [49] inserting a herring in it.

Mr. Riviera: Your witness.

Cross Examination

Q. (By Mr. Bowden): Your name is pronounced Mr. Frear? A. Frear, yes, sir.

Q. Frear. You're in the advertising business, you stated?

A. Yes, sir. I'm in the advertising business and the writing business. I sell stories. I had my own television program here a while back.

Q. Now, in that particular business, like many businesses, we have, oh, what might be termed codes of ethics or responsibilities to our consumers and

(Testimony of Gordon S. Frear.)

things like that. I don't mean to be too precise, but we have certain obligations in our advertising, don't we?

A. I would say that's certainly true.

Q. Now, you've been here during the entire trial and you've heard us refer to certain advertising, have you not? A. Yes, sir.

Q. You're familiar with that advertising in a general way?

A. Yes, I have seen some of the Herring Magic ads and mostly—clear back from the time when it started; I can't remember exactly.

Q. In that advertising don't they generally refer to this [50] device as a lure?

A. Well, I think—you're asking my opinion now, right?

Q. No, I'm just asking whether they do in fact. Don't they refer to it as a lure in that advertising?

A. Well, now, that's something that I can't be sure of. I remember the word "actionizer" real well, because I happen to have written an ad for that firm several months ago myself, and we stressed the word "actionizer."

Q. I see. You stressed the word "actionizer"?

A. Yes.

Mr. Bowden: I wonder if we can show the witness Plaintiff's Exhibit 4.

(The exhibit was handed to the witness.)

Q. (By Mr. Bowden): That has been referred to as old advertising or one of the first advertising.

(Testimony of Gordon S. Frear.)

Now, on that particular exhibit this article or this device is referred to as a lure, is that correct?

A. Yes, sir. I see it up here, "A hot lure."

Q. Excuse me for interrupting you. I don't mean to cut you off. A. It's all right.

Q. I'm just trying to expedite this matter. You say that you now have a system in preparing new advertising, is that correct, for Mr.—

A. Not necessarily new advertising, but additional [51] advertising.

Q. Oh, I see.

A. I mean—I think you'll realize any product as it progresses and more people start to use it, well, they have to go to other sources, and that's what Mr. Miller has been doing, and on several occasions we've sat down at lunch and discussed what a hot situation it was or a terrific lure. If I may use the word, I think "hot lure" is—and I may be wrong in my impression, but is there such a thing as a cliché or an expression that people pick up in the fishing trade business? We think of everything being hot that might possibly catch a fish. I see——

Q. Well, is what you're trying to say that in the industry or in the fishing business it is known——

A. Well, I mean for fun. You come off the dock and you've had a hot herring on, I mean I just—I see the word there, is all, and it reminds me of that. I see Mr. Korff there. He had the hottest

(Testimony of Gordon S. Freear.)

thing I think that was ever invented. Hot lure, hot spoon, hot spinner.

Q. So in other words you're saying that the advertising is not necessarily descriptive of what the——

A. Well, unfortunately in the fishing tackle industry it is my opinion that the majority of advertising is not given the proper thought. [52]

Q. Well, then, what in your opinion, then, is the effect of advertising a thing as a hot lure or a lure or a fishing lure, what is the effect? You as an advertising expert must know that it's going to attain that name if it's used long enough, I presume.

A. Well, I think it's rather worthless because I think the day and age of the consumer public is here and when you try and stampede them with hot type language, "This is the only thing that will work," I don't think it's worth anything any more.

Q. I wasn't referring necessarily to the hot type language, I was referring more to descriptive language. In other words, we don't call a car a bicycle and we don't call a bicycle a horse. Now, when you put out advertising which calls a thing a lure, is it a lure or is it something else?

A. Well, I—you're asking my opinion.

Q. Yes.

A. Now, I do not consider this a lure.

Q. I'm asking you your opinion of the advertising now. I'm not asking your opinion as to what you think it is. I'm asking you what the

(Testimony of Gordon S. Frear.)

effect of advertising a thing as a lure is on the general public.

A. Well, he states it pretty well, here, "Naturally catches more fish; it's the real thing, puts the natural injured [53] swimming action back in your herring."

Q. I realize that. We can all read the advertising. But you as an advertising expert, my only question is just what is the effect of calling a thing a lure upon the general public?

A. Well, I can't answer for the general public. I can answer for myself. I mean I don't think the fact that you would call this thing a lure would attempt to sell number one Herring Magic.

The Court: What is your occupation primarily?

A. I'm in the publication field, sir, and I——

The Court: Do you have anything to do with advertising and determining what mediums of advertising are good or bad?

A. Well,——

The Court: In your business of publication?

A. Yes, sir, occasionally. We have our own opinions.

The Court: Do you have anything to do with determining for your newspaper what words or mediums will be employed by your firm to accomplish the advertising service, if any, which you give to any part of your customer personnel, I mean customer trade?

A. Yes. In cases of a small manufacturer, sir, who does not employ an agency, we may occasion-

(Testimony of Gordon S. Frear.)

ally [54] advise or assist in the preparation of the copy. I would say that the majority of our accounts are nationally and controlled by large firms located in the East and the Midwest, and their copy, of course, is carefully prepared and arrives ready for insertion in the publications. On the other hand, as I mentioned, a small manufacturer may come in occasionally or something may happen and they may come to us and ask us for our opinion for what it's worth.

The Court: You may proceed.

Q. (By Mr. Bowden): Mr. Frear, then are you what might be referred to as an advertising expert?

A. I wouldn't like to be referred to particularly as an expert in anything.

Mr. Bowden: Well, may I inquire the purpose of calling this witness then, please?

Mr. Riviera: Mr. Frear has already qualified himself as to the types of publications. He publishes Pacific Northwest guides, he publishes several other sport guides. He said that he contacts sports and fishing outlets throughout the Northwest area with regard to fishing gear and tackle. He also testified that he is familiar with the wholesalers, and so forth.

Mr. Bowden: I don't mean to review his testimony, your Honor. My only impression is that he [55] himself says that he's not an advertising expert. Now, I'm——

The Court: Is your question is he offered as an expert on advertising?

(Testimony of Gordon S. Frear.)

Mr. Bowden: Yes, what is the purpose of offering this testimony. I can see no relevancy to the inquiry whatever. He himself says he's not an expert. Now,—

Mr. Riviera: Mr. Frear's own modesty, I believe, is the source of his declining to be called an expert. Many times I decline to call myself a hunter, though I occasionally go out. He has testified as to his experience in the fishing field and his allied experience, which is his primary source of livelihood, the advertising-publishing field. I believe he qualifies as an expert in two areas, in the fishing field itself and too as an expert in the experience and relationships between manufacturers and advertisers—advertisers and manufacturers of fishing gear and his own medium, the publishing field, and the public. Does that answer your question, Mr. Bowden?

Mr. Bowden: Yes. Your Honor, at this time I will interpose an objection to his entire testimony on the ground that he has not qualified as an expert. Thank you, your Honor. I have no further questions, [56] your Honor.

The Court: He has disowned for himself the quality of an expert on advertising values, has he not?

Mr. Riviera: Is your question directed to me, your Honor?

The Court: Yes. Has he done that or has he?

Mr. Riviera: I believe he has disqualified the nomenclature of expert on advertising, yes. That

(Testimony of Gordon S. Frear.)

is, the accolade, as distinguished from his practical experience and qualifications.

The Court: There is not any trouble that I know of whether you call him an advertising man or just an ordinary fellow as far as the sports fishing art is concerned without any expert knowledge. The Court will consider his testimony for whatever the Court thinks it is worth and will deny the motion to strike because he is not the kind of expert that the Counsel offering him represented he would turn out to be. The motion is denied.

Mr. Bowden: Thank you, your Honor. No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness—no, I think we will take a recess until two o'clock.

(Thereupon, at 11:53 o'clock a.m., a recess herein was taken until 2:00 p.m.) [57]

Tuesday, September 3, 1957.

2:00 o'clock p.m.

(All parties present as before.)

The Court: I wish to take up this trial now if there is no other matter. You may resume the trial proceedings.

Mr. Riviera: The plaintiff rests at this time, your Honor.

The Court: Very well, the plaintiff rests. You may proceed.

Mr. Bowden: The defendant at this time, your

Honor, would like to move for dismissal of this action on the ground that plaintiff has not presented a prima facie case. If your Honor please, I would like to argue that motion at this time.

The Court: No, I do not wish to hear the argument. The motion is held in abeyance until after this case is completed on the merits.

Mr. Bowden: Thank you, your Honor. May I call Willis Korff, please, to the stand.

The Court: Come forward and be sworn as a witness. [58]

WILLIS B. KORFF

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Bowden): State your name, please.

A. Willis B. Korff.

Q. And your principal occupation, Mr. Korff?

A. Fishing tackle manufacturer.

Q. How long have you been engaged in that profession, Mr. Korff?

A. Since the fall of 1952.

Mr. Riviera: If your Honor please, before Mr. Bowden takes up the train of questioning of his own witness I see I neglected a formal matter and that was the matter of a trial stipulation which was to be read into the record.

The Court: Do you wish to open up your case in chief for that purpose?

Mr. Riviera: Just for that purpose, your Honor.

The Court: Is there any objection?

(Testimony of Willis B. Korff.)

Mr. Bowden: No objection, your Honor.

The Court: Then that opening up is now granted and you may proceed, Mr. Riviera.

Mr. Riviera: If your Honor please and with [59] your Honor's permission I should like to read into the record the following statements which have been stipulated between the parties hereto as true.

(Reading) "1. This is an action brought against the United States of America under the laws of the United States for the recovery of a manufacturers excise tax on sporting goods for the period of April 1, 1955, to December 31, 1955, assessed against and collected from plaintiff by William E. Frank, District Director of Internal Revenue for the District of Washington, at Seattle, hereafter called the District Director.

"2. Myron C. Miller made application for a patent on the device hereinafter referred to on August 9, 1944. The patent based on the application was granted on February 15, 1949, as United States Patent No. 2461755. No application for or further patent has been granted to Myron C. Miller in connection with the device in question.

"3. Plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Washington. Plaintiff was incorporated on April 16, 1954. Myron C. [60] Miller at all times mentioned herein has been and now is the majority stockholder of plaintiff.

"4. Plaintiff commenced manufacturing a de-

(Testimony of Willis B. Korff.)

vice known as Herring Magic on or about January 1, 1955, and commenced selling the device on or about March 7, 1955. This device is the subject of the patent mentioned above.

"5. Various sizes of the device were sold by plaintiff to jobbers, wholesalers and retailers at prices ranging from \$0.7875 to \$0.99 commencing March 7, 1955. This price structure has remained unchanged to and including all times relative to this suit.

"6. On or about May 1, 1955, Myron C. Miller, acting for plaintiff, made oral inquiry at the Seattle office of the District Director as to whether a manufacturer's excise tax was applicable to the sale of the device here in question. As a result of this inquiry the District Director's office notified the plaintiff on June 8, 1955, that the device was subject to the manufacturer's excise tax imposed by Section 4161 of the Internal Revenue Code of 1954. [61]

"7. Thereafter, plaintiff filed quarterly excise tax returns, Form 720, for the period from April 1, 1955, to December 31, 1955, and paid the following taxes on the dates and in the amounts as follows:

September 12, 1955.....\$ 567.72

November 8, 1955..... 1,738.08

January 20, 1956..... 17.55

Total\$2,323.35

"8. On or about January 18, 1956, within the time and in the form and manner required by law, plaintiff filed with the District Director its claim

(Testimony of Willis B. Korff.)

for refund of the excise taxes paid as aforementioned in the sum of \$2,323.35.

“9. By registered letter, received by attorneys for plaintiff on November 8, 1956, the District Director disallowed in full the claim for refund. No part of plaintiff’s claim for refund has been paid or refunded since that time.

“10. The plaintiff has borne the economic burden of the taxes for which it seeks refund and has complied with the provisions of Section 6416(a) of the Internal Revenue Code of 1954. [62]

“11. The only issue in this cause is whether plaintiff’s device is an ‘artificial lure’ within the purview of Section 4161 of the Internal Revenue Code of 1954.”

And I offer each of those stipulations as evidence in the plaintiff’s case in chief.

The Court: I would like to know whether the other side has made these stipulations.

Mr. Bowden: Your Honor, the defendant through Counsel has made those stipulations of fact.

The Court: And have you any objections to their being considered, that stipulation and those stipulations, as being part of the plaintiff’s case in chief?

Mr. Bowden: I have no objection, your Honor.

The Court: Let the record show that. The Court receives it as a part of the plaintiff’s case in chief. Does the plaintiff now again rest finally?

Mr. Riviera: Yes, your Honor, we do.

The Court: The plaintiff now rests. You may resume the defendant’s case in chief.

(Testimony of Willis B. Korff.)

Mr. Bowden: For purposes of the record, your Honor, I would like to again move to have this action dismissed on the ground that they have not presented a prima facie case. [63]

The Court: The Court reserves ruling. You may proceed.

Q. (By Mr. Bowden): You stated your name was Mr. Korff? A. Yes, sir.

Q. Would you please briefly——

The Court: How do you spell it?

A. K-o-r, two f's.

The Court: And the first name is what?

A. Willis. Middle initial B.

The Court: K-o-r double f-s?

A. Yes, sir—no "s".

The Court: You may proceed.

Q. (By Mr. Bowden): What is your occupation, Mr. Korff?

A. Fishing tackle manufacturer.

Q. And how long have you been engaged in that business? A. Since 1952.

Q. Where are you engaged in that business?

A. In the City of Seattle, Ballard.

Q. What is the nature and extent of that business, Mr. Korff?

A. I don't understand the question.

Q. Just exactly what do you do in your business?

A. I devise fishing lures and complete the construction, manufacture, marketing, and every aspect of the business.

(Testimony of Willis B. Korff.)

Q. Before 1952 had you any experience in the fishing industry or business? [64]

A. Yes, sir.

Q. And how long before 1952 were you engaged in this business?

A. Probably, oh, four years in the retail fishing tackle business.

Q. Do you fish, Mr. Korff? A. Yes, sir.

Q. How extensively?

A. I've fished nearly all my life since the age of six, which amounts to twenty-eight years since.

The Court: Was that sport fishing or some other kind?

A. Primarily sport fishing. I have three months of commercial salmon trolling, your Honor.

Q. (By Mr. Bowden): You say that you have manufactured lures. Have you ever invented what might be termed a fishing lure?

A. Yes, sir, I've invented one that's been acclaimed pretty much internationally and nationally. I have to advertise for myself a little there.

Q. Well, would you briefly describe just exactly what the nature of that device is, Mr. Korff?

A. It's a spinning, a spinning type of lure. It consists of a balsa body with bright fluorescent paint, flame orange in color, a spinner blade, swivel, and a treble [65] hook attached. The shape of the body, pear shaped, I can probably illustrate it with this large one here. Buoyancy tends to bring the body up, the blade swings underneath and the current of the river where you're fishing tends to pull

(Testimony of Willis B. Korff.)

back causing the blade to flash underneath, and each time the blade swings one way the body swings another, giving a mechanical action which is attractive to the fish. It's primarily used for steelheading in the Northwest, but they have discovered that it attracts fish nearly everywhere.

Q. How does that attract fish, do you know, Mr. Korff?

A. Well, probably three ways. One would be the flash of this blade. Another would be each time the blade swings it swings the body which gives it a wiggling motion, and the third one would be the bright fluorescent paint.

Q. What in your opinion, Mr. Korff, is necessary to constitute a lure? In other words, what is your definition of a lure?

A. My definition of a lure is a man made device created for the purpose of attracting fish and to assist in enticing these fish to strike and attach to our presented fishhook. This artificial attraction can be in the form of a brilliant flash, a mechanical action, a color, shape, an odor, or any other enticement characteristic or any combination of those.

Q. Now, more particularly, Mr. Korff, the cherry popper, what attributes of a lure does that have?

A. It has what I figure three, and I named those previous. One is this flash, one is the mechanical action and the third is the color.

The Court: I wish you to be reminded that he is

(Testimony of Willis B. Korff.)

referring to something that is not in evidence and I do not know whether it has even been marked.

Mr. Bowden: Yes, your Honor. At this time I'd like to have marked the three cardboards which are on Mr. Korff's desk as Defendant's Exhibit A, if your Honor please.

The Clerk: Defendant's A-1, A-2 and A-3.

The Witness: There are four of them here.

The Clerk: And A-4.

(Four cardboards containing displays of fishing lures were marked Defendant's Exhibits Nos. A-1, A-2, A-3 and A-4, respectively, for identification.)

The Court: Resume the interrogation.

Mr. Bowden: Thank you, your Honor.

Q. (By Mr. Bowden): Mr. Korff, would you kindly refer in your future testimony when you're speaking of any of those cardboards before you, would you kindly speak of those as Defendant's Exhibit A-1, -2, -3, however they [67] are marked, have been marked, and would you identify each one of those at this time and just state briefly what they purport to be?

A. This one is labeled A-3. It doesn't necessarily have to be in order?

Q. No, sir.

A. These are a tracker blade, gang trolls and flashers, just a few examples of a type of lure. These——

Q. You can go on to the next one at this time, Mr. Korff. We'll go back and go through them.

(Testimony of Willis B. Korff.)

A. All right. This one is A-4, consisting of flies, bugs, jigs, poppers and novelty type lures.

This one is A-1, the plug type of fishing lures.

This one is A-2, consisting of spoons and wobblers and the spinner type lures.

Mr. Bowden: Your Honor, I at this time move for introduction into evidence of Defendant's Exhibits A-1, -2, -3 and -4.

Mr. Riviera: No objection, your Honor.

The Court: Each of them is admitted, that is A-1, A-2, A-3, A-4.

(Defendant's Exhibits Nos. A-1, A-2, A-3 and A-4 for identification were admitted in evidence.)

The Court: It is not easy for the Court to [68] see what they have to do with this lawsuit, but maybe that will come out a little more later. The Court is trying this patented object as to whether or not it is a sport fishing lure, among other things. I did not know we were going to try all these other gadgets that have been mentioned in Seattle's trade. You may proceed.

Mr. Bowden: Thank you, your Honor.

Q. (By Mr. Bowden): With reference to Defendant's A-1, -2, -3 and -4, Mr. Korff, which you have before you, what are these particular items known as in the fishing trade in the Northwest?

A. They're all artificial fishing lures.

Q. Now would you please hold up Defendant's Exhibit A-1.

(Witness does as requested.)

(Testimony of Willis B. Korff.)

Q. Now, do any of those that you have said are artificial lures require the addition of anything so as to produce effectiveness as a lure?

A. There's probably, let's see, one, two, three, four, five, six,—six possibles.

Q. Now would you point to those, starting from the right to the left?

A. This one could require salmon eggs. This one requires a live bug placed inside, this one a herring strip, this one a whole herring, this one a whole herring and this one a herring strip. [69]

Q. All right. Now, if we may go on to the next exhibit, A-2, please. Are those known as lures in the fishing community, Mr. Korff?

A. Yes, sir.

Q. Do any of those require the addition of anything to make them effective as a lure?

A. This one requires a herring, generally a minnow. This one requires a worm and this one requires possibly some sort of natural bait food. This one may require salmon eggs, this one may require salmon egg juice, this one requires salmon eggs.

Q. Now may we go on to Defendant's Exhibit A-3, please. Now, in respect to that exhibit, Mr. Korff, do any of those require the addition of anything to make them effective as a lure?

A. Every one of these requires something.

Q. Let me put it another way to you, Mr. Korff. In your opinion does the requiring of something additional, does that detract from it being a lure?

(Testimony of Willis B. Korff.)

A. Certainly not.

Q. Now would you explain that briefly?

A. Well, for instance we'll take this large one. This is the trade name known as Kelp Cutter, kelp cutting having no bearing on the lure. It has a whirling motion which in turn causes a white flash which as it whirls and the [70] attached leader, regardless of whether we have herring or a spoon or anything shiny back here, as it whirls it causes the hook and the attached object to jump and as the fish comes—is attracted to this he sees this one and if he's hungry or is excited he might take it.

This type and this type have a different type of action. They have a sideways motion, and in turn a herring or a spinner or a spoon or something shiny may be attached to this one, except that the action is a little bit—not quite so strong.

These have no direct action. They merely—the attractor blades merely revolve on the shaft and fish are attracted by all these little flashes and come to see what it is, and the fisherman usually hangs maybe a worm or some very small hook back there with something baited or maybe a little fly or something, because the fish that are usually attracted to this type of lure are small, and they couldn't get this in their mouth but they would bite the little object behind it.

Q. So it's your opinion it's the flashing or the swirling action that causes the attraction?

A. Yes, sir.

Q. Would you go back now to Defendant's Ex-

(Testimony of Willis B. Korff.)

hibit A-1, which has the Herring Magic on it. Now would you point to what has been pointed out here as Plaintiff's Exhibit 1 [71] which is known as the Herring Magic?

A. This one is known as Herring Magic.

Q. Now, have you had occasion to use that in your fishing, Mr. Korff? A. Yes, sir.

Q. And have you had occasion to run certain tests with that particular device, Mr. Korff?

A. Yes, sir.

Q. I wonder if you would just very briefly explain to the Court the tests that you've run and the conclusions that you've reached.

A. The conclusion I've reached on Herring Magic is that if herring, or any properly shaped or size minnow, or piece of wood or other object if it's properly shaped, is placed in there and trolled, pulled through the water so that the scoop shape face will bring out the mechanical action, it will be caused to give a wiggling motion and in turn be an enticement to the fish.

Q. Well, is it the action—pardon me. What is it then in Herring Magic that attracts the fish?

A. Well, primarily the action, I would say.

Q. The action is caused by what?

A. Pardon me?

Q. The action is caused by what?

A. The little scoop in the front drawing against the water, [72] the water resistance.

Q. Now, is that similar in action to other types of lures? A. Yes, sir.

(Testimony of Willis B. Korff.)

Q. Other types that have been referred to on Defendant's Exhibit—

A. The reason I've referred to these lures as plug type is because of the unique shape of the face, which gives nearly each one that particular type of action. This plug has a scoop, this one has a scoop, this one has a scoop, they all have some sort of an inclination or a concave surface in the front so that when—and the line is usually attached in the center of that surface and when pulled through the water it gives—it's angle such that the water resistance causes it to turn or twist or whichever way they want it to act.

Q. So is it your testimony that it's the action which is caused which does the attracting?

A. Primarily.

Q. I see. Now, you've stated that in your opinion the Herring Magic is an artificial lure. What makes you come to that conclusion? In other words, how have you prepared yourself to come to that conclusion, Mr. Korff?

A. It's an artificial means of attracting the fish to that fishhook that's back there.

Q. Is it known in the community as an artificial lure? [73]

A. Definitely.

Q. What makes you come to that conclusion?

A. Oh, I've asked quite a—

Mr. Riviera: Objection, your Honor.

The Court: We cannot have what he said in the absence of other people, that is, people connected with this case.

(Testimony of Willis B. Korff.)

Mr. Bowden: I feel this way, your Honor: The witness can explain how he informed himself, whether he has read a book, whether he has had a personal experience, whether he saw a movie, whether he has——

The Court: He can say in round numbers without saying what he said and without saying what someone else said.

Mr. Bowden: Yes, your Honor.

The Court: He can say what he did, that is all, he cannot say what he or anyone else said.

Mr. Bowden: Fine. Thank you, your Honor.

Q. (By Mr. Bowden): Let's go back one moment in respect to your testimony as far as you actually using the Herring Magic as a—while fishing. Would you just explain briefly again the device that you used in testing Herring Magic? In other words, explain briefly what experiments you made with Herring Magic.

A. I tried it as recommended in the directions, and since [74] I am—I love to fish artificial lures in the complete so that there's no form of natural bait whatsoever connected, I ran a test with a piece of wood, and I found that I could get as good if not better action with the piece of wood.

Q. So in other words it's your opinion that it's the device which causes the attraction?

A. Well, the fish wouldn't bite the piece of wood dragged alone, but with the Herring Magic they would.

Mr. Bowden: You may inquire.

(Testimony of Willis B. Korff.)

Cross Examination

Q. (By Mr. Riviera): Mr. Korff, would you hold up the defendant's exhibit that has your own invention on it?

A. I have several inventions on this.

Q. I mean the one that you described in the very beginning.

A. The large one?

Q. Yes. Please hold it up so that I can see it.

(The witness did as requested.)

Q. Now would you point to your own invention?

A. This one, this one, this one, this one, this one, this one and this one.

Q. Well, those are so far away that I can't really discern any excepting the large one, the first one that you [75] pointed at. Is that the one you described first?

A. This large one is the first one we talked about.

Q. Yes. Now, doesn't the body—what would you call that, buoy?

A. Well, you could call it the body.

Q. All right, let's call it the body. Doesn't that body serve to attract the fish?

A. Certainly.

Q. Does the metal flasher underneath the body help in attracting the fish?

A. Yes, sir.

Q. And what is that below the metal flasher? That is on the line?

A. Here?

Q. Yes. What is that?

A. That's a swivel.

Q. That's a swivel, and nothing else beyond that?

A. No.

(Testimony of Willis B. Korff.)

Q. Will you hold up—what exhibit number is that, Mr. Korff? A. This is A-4.

Q. A-4. Would you hold up A-3?

(The witness did as requested.)

Q. Now, I can't see the term——

The Court: Take that and stand about in that [76] position.

Mr. Riviera: That's fine.

The Court: Go forward a little farther towards the table. Can you see it now?

Mr. Riviera: Yes, fine. Thank you, your Honor.

The Court: Can you see it, Mr. Bowden?

Mr. Bowden: Yes, your Honor.

(The witness moved to Counsel table.)

Q. (By Mr. Riviera): Mr. Korff, you call those things game trolls and flashers?

A. Gang trolls.

Q. Gang trolls. Now,——

A. They're also known under other names, too.

Q. Oh. What other names are they known as?

A. These are called herring dodgers, these are attractor blades, for their own trade name, or just trolls. There's quite a number of names, but it all boils down to the gang trolls or flasher or attractor blades.

Q. And they are called lures, aren't they?

A. Yes.

Q. And the color of each of the objects shown on Defendant's Exhibit No. 3, the color of the object participates or serves in the luring quality of the device, isn't that right? [77]

(Testimony of Willis B. Korff.)

A. Yes, sir, it helps, too.

Q. Now would you get Defendant's Exhibit A-2 and approach so one can see it.

(The witness did as requested.)

Q. Now, every one of the devices on Defendant's Exhibit A-2 has some color, doesn't it? Isn't that true?

A. Yes, sir.

Q. And everyone of those devices, of the devices shown on Defendant's Exhibit A-2, will produce some action in the water by itself, isn't that right?

A. Yes, sir,—“in itself,” you mean as trolls?

Q. Yes, when used in the water.

A. Yes, sir.

Q. All right. Now would you get Defendant's Exhibit A-1.

(The witness did as requested.)

Q. Now, in Defendant's Exhibit A-1 you have given the term “plug type” to the devices shown on Defendant's Exhibit A-1. Now, in the first row third from the left there is something which appears to be an imitation crab, is it, or——

A. Crawdan.

Q. A what?

A. Crawdan, a fresh water crustacian.

Q. Oh, that's an imitation of some natural form of bait?

A. Yes, sir. [78]

Q. Now, each one of the devices shown in the first row of Defendant's Exhibit A-1, they all have some color, don't they?

A. Yes, sir.

Q. Some discernible color?

A. Yes, sir.

Q. And each one of those also will produce some

(Testimony of Willis B. Korff.)

type of action in the water? A. Yes, sir.

Q. And the action that each one of those will produce in itself is attractive to fish, isn't that right? A. Yes, sir.

Q. Now would you step a little closer so that I can point to some. Now, the first seven in line—well, the second line, each of those has some color, isn't that right? A. Yes, sir.

Q. And each one of those when placed in the water will produce some action that is attractive to fish by themselves, isn't that right?

A. Uh-huh.

Q. Now if you'll get closer again. Number 8, which is a plastic type of plug, is in the form of a little—what would you call that, a little minnow?

A. A little minnow. [79]

Q. That is, in itself it looks like a minnow?

A. Yes, sir.

Q. And Number 9 is in the shape something like a cigar but it's oddly shaped, it has two flat surfaces, isn't that right? Would you call those flat surfaces? A. Planing surfaces.

Q. And that will also give some action in the water by itself? A. Yes, sir.

Q. Now, the last one on the second row, I think the trade name is Strip Rig, would you call that a fluorescent stripe on it?

A. It looks like fluorescent.

Q. And that's how it comes from the manufacturer? A. I believe so.

Q. And that fluorescent paint or stripe is at-

(Testimony of Willis B. Korff.)

tractive to fish, isn't it? A. Some fish.

Q. Some fish. That color or near that color is shown on some of the other plugs on this exhibit, isn't that right? A. Yes, sir.

Q. Now, the first one in Row 3, how do you describe this device?

A. That's a flexible type of plug with a semi-concave face which gives it a spinning motion on the order of these— [80] let's see, one, two—these three here.

Q. You say it is flexible. Do you mean that when—— A. No, it's flexible to the touch.

Q. Flexible to the touch?

A. Like a piece of cheese.

Q. And when drawn through the water will it have some action? A. That's right.

Q. And it has a color that is attractive to fish all by itself? A. Not necessarily.

Q. Is the color discernible? That is, can you describe—— A. Yes, it is.

Q. And do you think that color is attractive to fish?

A. This color was an experimental color. We don't know yet.

Q. Oh, it's an experimental color. Is that your own invention? A. Yes, it is.

Q. Oh, I see. Now, the second one in Row 3, isn't that a device formerly manufactured by a Martin Fishery Company? A. Yes, sir.

Q. And no longer manufactured?

A. I wouldn't know.

(Testimony of Willis B. Korff.)

Q. And then No. 3 is the Herring Magic and No. 4 in the third row, what is this called? [81]

A. That's a strip rig.

Q. Strip rig? A. Yes, sir.

Q. And does this device, this strip rig, have any action in the water by itself? A. A little.

Q. Attractive to fish?

A. Some fish may be attracted by it.

Q. There's a possibility?

A. It's not practicable, it wasn't intended for that.

Q. It has no color by itself?

A. Yes, sir. Well, not as much as the rest.

Q. It's a translucent plastic, isn't it?

A. Yes.

Q. What color would you call it?

A. I would call it a—it's a translucent—well, that's about all you can say, it's translucent as this one and as the other one I showed you had color up there.

Q. Now, the strip rig, the last one on Row 3, if placed in a jar of water similar to Plaintiff's Exhibit No. 13,—do you see Plaintiff's Exhibit No. 13, that jar over there? A. I saw it.

Q. That would give—you could see that strip rig which is the last one on Row 3 to about the same extent as [82] you can see the device in Plaintiff's Exhibit No. 13, is that right?

A. I believe not.

Q. You may take the stand again.

A. Which one did you want in there? There's two strip rigs.

(Testimony of Willis B. Korff.)

Q. Oh, no, I'm sorry, I didn't ask you to put it in there. I asked you to go back to the stand.

A. Oh, I'm sorry.

(The witness resumed the stand.)

Q. Now, a few moments ago you talked about the term artificial fishing lures. Is that the term everyone uses in describing these devices shown in Defendant's Exhibits A-1, -2, -3 and -4?

A. So far as I know, if it's properly expressed.

Q. Now, artificial fishing lures is quite a mouthful of words. Isn't it true that generally when referring to the general type of device shown on those exhibits the word "lures" is used? A. I don't.

Q. You don't. Do you do much fishing with just plain hooks? A. Yes, sir.

Q. Now I'm holding in my hand a large hook. Do you see it clearly? A. Yes, sir.

Q. And there's no particular difference between this type [83] of a hook and some of the hooks shown on the devices in your exhibits, isn't that right?

A. As far as principle of a fishhook.

Q. Yes, it's the same thing, an ordinary hook. Now, if you went fishing with just the hook at the end of the line, do you think you'd catch much fish?

A. I know a number of fellows that were arrested over last week end for doing that.

Q. Well, but would you go out fishing and use just a bare hook? A. No, sir.

Q. So the hook has no luring qualities, has it?

A. Yes, sir.

(Testimony of Willis B. Korff.)

Q. It has? A. Yes, sir.

Q. What are they? Just the hook alone.

A. The hook is—this hook is plated, nickel plated, which is shiny and which has luring qualities. Herring, when we catch herring for bait in the ocean, we use a little tiny single hook, about seven or eight of them on a line, drop it down and jig them up and down and the herring will run and grab that little hook, and we put the herring in the boat and use them for bait.

Q. Do you have any idea how far a fish can see in the water? A. Yes, sir. [84]

Q. About how far?

A. In clear water about thirty feet, some species.

Q. And in sea water?

A. In sea water, depending on the depth and the time of day and in what area. It's quite a lot shorter range of vision because sea water in the Northwest is full of vegetation, microscopic plants and animals.

Q. Now, as a general rule isn't it true that most people when fishing with a hook put some form of bait on the hook? A. Not necessarily.

Q. Well, it's not true, then, most people fish with just a bare hook?

A. You might make a replica of bait or you might put the actual living or natural food on there. Some people tie feathers on there and catch fish.

(Testimony of Willis B. Korff.)

Q. But most people if not all people put something else on the hook and fish?

A. Not entirely, as I explained about the herring.

Q. In your opinion, Mr. Korff, is a hook when used alone an artificial lure? A. It might be.

Q. Mr. Korff, a few moments ago you told us about an experiment you made. Do you have the device that you used to experiment with, do you have that with you? [85]

A. It takes considerable equipment.

Q. Well, you mean to make it or to use it?

A. To use it and to make it, et cetera.

Q. Well, what was it when you finished with it?

A. What was what?

Q. What was this wooden device you used with the Herring Magic?

A. It was just a little piece of wood I put inside to balance it.

Q. When using this piece of wood with the Herring Magic device, did the wood give any motion, produce any action? A. Did the wood?

Q. Yes. A. Yes.

Q. Do you think the wood gave the device altogether some luring qualities? A. It assisted.

Mr. Riviera: No further questions.

Redirect Examination

Q. (By Mr. Bowden): In your opinion, Mr. Korff, must a lure have all the qualities, namely color, shape, odor, sight, to constitute a lure?

(Testimony of Willis B. Korff.)

A. No, sir. It may have one or many. [86]

Q. What characteristic of a lure does Herring Magic have?

A. It has a mechanical action, some color by way of refraction of light, plus a flashy fishhook. Primarily the inherent quality in Herring Magic is the mechanical feature which is the scoop in front.

Mr. Bowden: No further questions, your Honor.

Recross Examination

Q. (By Mr. Riviera): Mr. Korff,—

Mr. Bowden: Excuse me. May he inquire further, your Honor?

Mr. Riviera: I take it I—

The Court: That is the penalty, often it is. I would certainly like the plaintiff to be accorded reasonable recross examination, since you have had redirect.

Mr. Riviera: May I continue?

The Court: I wish you to be as brief as possible, please, Mr. Riviera.

Mr. Riviera: Indeed I will, your Honor.

Q. (By Mr. Riviera): Mr. Korff, when the minnow is used with the Herring Magic, isn't it true that the flexible body of the minnow contributes in some manner to the luring qualities of the device as a whole? [87]

A. Not necessarily.

Q. Doesn't the tail of the minnow act as a stabilizer when in use?

A. It might to a certain point.

(Testimony of Willis B. Korff.)

Mr. Riviera: That's all, your Honor.

The Court: Anything else?

Mr. Bowden: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Bowden: I'll call Mr. Miller as an adverse witness at this time, your Honor please.

The Court: That may be done. He will come forward and take the stand. He has already been sworn.

Mr. Bowden: I would like to have Defendant's Exhibit B marked for identification, please.

The Clerk: It will be Defendant's Exhibit No. A-5.

(A brown booklet was marked Defendant's Exhibit No. A-5 for identification.) [88]

MYRON CHARLES MILLER

recalled as an adverse witness by defendant, being previously duly sworn, was examined and testified further as follows:

Direct Examination

Q. (By Mr. Bowden): Will you identify that, Mr. Miller, Defendant's Exhibit B, please? Tell us what it is.

A. This is a brown booklet that we put in the hands of the dealers. It's free to the dealers to hand out to their customers, and it gives testimony inside of voluntary testimonials that have been

(Testimony of Myron Charles Miller.)

sent in to us by fishermen who have used the Herring Magic.

Mr. Bowden: I would like to offer Defendant's Exhibit B into evidence, your Honor.

Mr. Riviera: I have no objection. I think it has been marked Defendant's Exhibit A-5.

The Court: That is true, it has been, and as such A-5 it is now admitted.

(Defendant's Exhibit No. A-5 for identification was admitted in evidence.)

Mr. Bowden: I'm in error, your Honor. I should not have offered it. I didn't realize it had already been offered.

Mr. Riviera: No, I didn't say that.

The Court: You misstated yourself by referring [89] to it as "B."

Mr. Bowden: I'm sorry, your Honor. A-5, your Honor.

The Court: A-5.

Q. (By Mr. Bowden): Do you recall when that particular exhibit, Defendant's Exhibit A-5, was made available to the public, what year?

A. I'm not positive. I think it was 1956.

Mr. Bowden: No further questions, your Honor.

The Court: What do you call that A-5, that Exhibit A-5? What kind of a thing is it?

A. Your Honor, I believe this would be termed as a point of sale literature, is what it's usually referred to. It's free literature given out by the manufacturer.

The Court: Is it——

(Testimony of Myron Charles Miller.)

A. Promotional——

The Court: That is sufficient. Who usually distributes this?

A. Your Honor, our jobbers have these and they distribute them to the dealers and the dealers make them available on the counters for the fishermen.

The Court: Are there any further questions on anyone's part? Did you finish, Mr. Bowden?

Mr. Bowden: No further questions, your Honor.

The Court: Is there anything further by reason of these questions last asked?

Mr. Riviera: No, your Honor, there's nothing further in that respect. I should like to inquire of Mr.——

The Court: You would not be entitled to inquire now, would you?

Mr. Riviera: No, I would not.

The Court: Very well, the witness will step down.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Riviera: I should like to call Mr. Miller as a rebuttal witness.

The Court: Do you have any further witnesses to call?

Mr. Bowden: No, I have no further witnesses, your Honor, but I have two things I would like to bring up, if I might, at this time.

The Court: Very well.

Mr. Bowden: If I erred and forgot to offer De-

fendant's Exhibits A-1, -2, -3 and -4, I would like to do so at this time.

The Court: They are already admitted according to my record. [91]

Mr. Bowden: Fine. Then the further matter is that a pretrial exhibit was served upon the Counsel for the taxpayer before this trial began in accordance with your Honor's order. I have nothing further to say in behalf of the defense, your Honor.

The Court: I have something before me called a memorandum of law.

Mr. Bowden: Yes, your Honor, that's the document that I served.

The Court: It was served and filed today.

Mr. Bowden: Yes.

The Court: You may now call proper rebuttal witnesses.

Mr. Riviera: Yes, your Honor. Mr. Miller.

MYRON CHARLES MILLER

recalled as a witness in behalf of plaintiff, being previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

Q. (By Mr. Riviera): Mr. Miller, does the minnow when used with the Herring Magic device contribute to the action of the device and the minnow in the water? A. Very definitely, sir.

Q. What portion of the minnow does so? [92]

A. The complete minnow.

(Testimony of Myron Charles Miller.)

Q. Does any particular part of the minnow act as a stabilizer?

A. Yes, sir, the entire body becomes a stabilizer.

Q. Mr. Miller, has the term "actionizer" acquired any wide use in the minds of the public?

A. Yes. It is referred to generally as the Herring Magic actionizer because of our television programs and our general mentioning it on our stationery, and so forth.

Q. You mentioned television programs. Do you advertise this device on television?

A. Oh, yes, sir.

Q. And how is it referred to on the program?

A. Well, it's referred to as a herring actionizer, an invisible device for putting live swimming action back in dead herring.

Q. Is there any other device on the market today that is using the term "actionizer"?

A. No, sir, not—well, using the term "actionizer"?

Q. Yes.

A. I believe there is one coming out on the market very soon that will use the word "actionizer."

Mr. Riviera: No further questions.

Mr. Bowden: No further questions, your Honor.

The Court: Step down.

(Witness excused.) [93]

The Court: Call the next witness.

Mr. Riviera: There are no further witnesses in rebuttal, your Honor.

The Court: Do you rest?

Mr. Riviera: We rest, your Honor.

The Court: Does the defendant rest?

Mr. Bowden: The defense rests, your Honor.

The Court: I wish to hear argument. Perhaps it might be well to take a short recess. How long do you wish to argue, Mr. Riviera?

Mr. Riviera: I should judge, your Honor, about twenty to thirty minutes.

The Court: How much time do you need, Mr. Bowden? Do you not think twenty minutes on each side is enough? It is not very——

Mr. Riviera: I should judge that would be about right, your Honor.

Mr. Bowden: I wouldn't expect to take more than twenty minutes, your Honor.

The Court: Each side may have twenty minutes, and you may divide yours between opening and closing for the plaintiff in such amounts as you wish.

Mr. Riviera: Very well, your Honor.

The Court: Court is now at recess for about ten minutes. [94]

(Short recess.)

(Thereupon, oral argument was presented to the Court by Mr. Riviera in behalf of plaintiff and by Mr. Bowden in behalf of defendant.)

The Court: From a preponderance of the evidence the Court finds, concludes and decides as follows:

That the completed functioning lure in question

here includes not only the device described in Plaintiff's Exhibit 1, but also the bait which it is hoped the lured fish will take. The completed functional thing, therefore, is that thing which, when cast into the water, serves to attract or allure the desired fish onto the hook. But the inanimate bait would not be activated so as to attract and allure the intended catch onto the hook in this instance without the work of plaintiff's actionizer. It is the thing which through manufacturing design artificially activates the inanimate bait as the result of the passing of the water over that thing's irregular surfaces, by which action of which thing the intended catch is lured onto that thing's hook. That device is the "artificial lure" taxed by the statute.

Therefore, it seems clear to the Court upon the evidence submitted during this trial the tax [95] collector for the Government is correct in holding that this is an artificial lure subject to the tax, and that plaintiff is not entitled to recover in this action and that the plaintiff should take nothing by his complaint herein.

(At 3:40 o'clock p.m., Tuesday, September 3, 1957, the hearing was adjourned.) [96]

[Endorsed]: Filed Sept. 16, 1957.

[Endorsed]: No. 15736. United States Court of Appeals for the Ninth Circuit. Herring Magic, a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 8, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15736

HERRING MAGIC, a Washington corporation,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

STATEMENT OF POINTS

Pursuant to Rule 17 of the Rules of the United States Court of Appeals for the Ninth Circuit, the appellant hereby designates the following as a statement of points upon which it intends to rely:

1. The United States District Court erred in finding as a matter of fact and concluding as a matter of law that plaintiff's device is an "artificial lure" within the purview of section 4161 of the Internal Revenue Code of 1954.

2. The United States District Court erred in granting judgment for defendant.

Dated this 9th day of October, 1957.

GARVIN, ASHLEY & FOSTER.

Acknowledgment of Receipt of Copy Attached.

[Endorsed]: Filed Oct. 10, 1957. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the appellant, through its attorneys, Garvin, Ashley & Foster, and Daniel J. Riviera, and the respondent, through one of its attorneys, Charles P. Moriarty, United States Attorney for the Western District of Washington, that subject to the approval of the Court, all exhibits will be omitted from the printed record for purposes of appeal, but that said exhibits may be referred to by both parties in their briefs, at the hearing, and in argument before the Appellate Court, in all respects as though they were printed in the record.

Dated this 25th day of October, 1957.

GARVIN, ASHLEY & FOSTER,

/s/ DANIEL J. RIVIERA,

Attorneys for Appellant, Herring Magic, a Washington corporation.

/s/ CHARLES P. MORIARTY,

Attorney for Appellee, United
States of America.

[Endorsed]: Filed Nov. 8, 1957. Paul P. O'Brien, Clerk.

